Supreme Court, U.S.
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No. 03

IN THE

Supreme Court of the United States

ESSEF CORPORATION, PAC-FAB, INC., AND STRUCTURAL EUROPE N.V.,

Petitioners,

v.

JOHN AND JOYCE SILIVANCH, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it was error for the court below to conclude, in conflict with precedents of multiple courts of appeals and of this Court, that an attorney's mistake of fact precluded a finding of excusable neglect based on the equitable balancing of all relevant circumstances this Court prescribed in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993).

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties below:

Celebrity Cruises, Inc., and Fantasia Cruising, Inc.; Dorothy Cantone, individually and as Administratrix and Personal Representative of the Estate of Pasquale C. Cantone; Ronald and Sima Cesarski; Felice and Frances DeFrancesco; Frank and Rita Galante; Raymond W. and Mary Ruth Hague; Kevin L. Jenkins; Jane King; Clare Dillon; Louis B. and Mary Montes; Mary Purcell; Michael and Doris Sckipp; Sara Tofano; Richard and Carol Lorenzo; Paul and Phyllis Freeman; Josephine Monticciolo; Ralph Esposito; Anne Albino; Simone Dranov; Eva Rabinovich; Vincent and Myrna Viola; George and Margaret Stancati; William and Kathleen Buck; William Buck Jr.; Kimberly Buck; Perdita I. Spaar and William Spaar Jr.; Leslie Perlin and Barry Perlin, M.D.; John Bentzley; Suzanne Benzing, Executrix of the Estate of John J. Benzing; Amelia Benzing; Alexander and Linda Thomas.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Essef Corporation is the parent corporation of Petitioners Pac-Fab, Inc., n.k.a. Pentair Pool Products, Inc., and Structural Europe N.V., n.k.a. Pentair Water Belgium, f.k.a. SFC. The parent corporation of Essef Corporation is Pentair, Inc. No publicly owned corporation owns more than 10% of any of Pentair, Inc.'s stock.

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RULE

Fed. R. App. P. 4(a)(5) 1

PETITION FOR WRIT OF CERTIORARI

Petitioners the Essef Corporation, Pac-Fab, Inc., and Structural Europe N.V. (collectively "Essef") respectfully request that this Court grant their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit below.

OPINIONS BELOW

The opinion of the court of appeals is published at 333 F.3d 355 (2d Cir. 2003) and appears in the Appendix of this Petition ("Pet. App.") at 1a-27a. The court of appeals' unpublished order denying the petition for rehearing *en banc* appears at Pet. App. 34a-35a. The unpublished order of the district court order on review is available at 2002 WL 1000949 (S.D.N.Y. May 15, 2002) and appears at Pet. App. 28a-33a.

JURISDICTION

The court of appeals entered judgment on June 25, 2003, and denied a timely petition for rehearing *en banc* on August 28, 2003. The court of appeals stayed its mandate provided this Petition is filed by October 14, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISION INVOLVED

The relevant provision of the Federal Rules of Appellate Procedure 4(a)(5) is reproduced at Pet. App. 36a-37a.[1]

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[1] Rule 4(a)(5) was amended in 2002, but that amendment is immaterial because it did not change the excusable neglect standard that is the subject of this petition. For the Court's convenience, Petitioners have attached both versions of Rule 4(a)(5). The prior version appears at Pet. App. 37a, and the current version appears at Pet. App. 36a.

STATEMENT OF THE CASE

This case presents a conflict with decisions of this Court and other courts of appeals on a critical element of federal judicial procedure: namely, the standard for "excusable neglect" this Court established in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). That standard governs district court discretion to grant relief from filing deadlines under a number of federal rules and statutes. In *Pioneer*, this Court held that a trial court determining whether neglect is "excusable" must engage in an equitable balancing of "all relevant circumstances," including four specific factors: prejudice to other parties, the length of delay, the reason for delay, and the effect on judicial proceedings. *Id.* at 395.

In the decision below, the Second Circuit has held that a finding on a single *Pioneer* factor – the reason for the delay was an attorney's mistake of fact – extinguishes the district court's discretion to weigh *any* other relevant factors and find the attorney's neglect excusable despite the utter absence of prejudice, delay, or impact on judicial proceedings caused by his mistake. In short, the decision below fundamentally restructures the analysis this Court embraced in *Pioneer* by elevating the reason for the delay to dispositive status.

The court of appeals in the decision below thus immunized from appeal multimillion dollar judgments because of an inconsequential delay from an attorney's mistaken reliance on an opposing counsel's representation of the relevant deadline for appeals. The Second Circuit's self-described "hard line" position, Pet. App. 21a, directly contradicts this Court's "liberal understanding" of the excusable neglect standard, *Stutson* v. *United States*, 516 U.S. 193, 194 (1996) (per curiam). Indeed, in *Pioneer*, this Court specifically held that the movant seeking relief from a filing deadline need *not* make a preliminary showing that there was an adequate reason for the delay before a trial court undertakes equitably

to balance the prejudice to nonmovants, length of delay, or impact on judicial proceedings and any other relevant circumstances. 507 U.S. at 395 & nn.13-14. To the contrary, this Court held that good faith and the absence of prejudice or of effect on judicial proceedings "weigh strongly" in favor of finding excusable neglect. *Id.* at 398. The Second Circuit's elevation of the reason for delay as the dispositive factor is irreconcilable with the *Pioneer* framework, and is at odds with decisions of other courts of appeals that are faithful to *Pioneer*. This Court should grant review to resolve these conflicts of authority, as well as the inconsistency with this Court's own precedent.

Factual Background

This case arose from a 1994 outbreak of Legionnaires' Disease on board a ship operated by Celebrity Cruise Lines, Inc. and Fantasia Cruising, Inc. (hereinafter "Celebrity"). Plaintiffs alleged that a cause of the outbreak was a bacterial build-up in a whirlpool that was attributable to a defect in filters designed, manufactured, and distributed by petitioner Essef. Plaintiffs sued Essef and Celebrity, and Celebrity in turn cross-claimed against Essef for indemnification and other damages. Pet. App. 3a-4a.

Proceedings Below

Twenty-two separate actions were filed by the end of 1995 in the district court. The actions were consolidated, and the plaintiffs' claims (unless settled) were litigated by consent before a magistrate judge. The parties agreed to a "bellwether" procedure to expedite resolution of all the actions. Under that procedure, the claims of two plaintiffs – John and Joyce Silivanch – would be tried to a jury. The jury would determine each defendant's proportionate liability and Celebrity's right of indemnification against Essef. The *Silivanch* jury also would determine issues of causation of the Silivanches' injuries and their compensatory damages, and each defendant's liability for any punitive damages to all the

plaintiffs as a group. The *Silivanch* jury's findings on all issues would be binding in all of the remaining cases, except for proximate cause and compensatory damages; each plaintiff was entitled to a separate trial on those two issues. The court would allocate any punitive damages awarded in the bellwether trial among the various plaintiffs. Pet. App. 4a-5a.

In June 2000, the jury returned a verdict finding that the defendants were liable to the Silivanches and that Essef was obliged to indemnify Celebrity. A nonfinal judgment was issued on September 5, 2000 (and entered on the docket on September 6, 2000) awarding the Silivanches $3.6 million in compensatory damages and prejudgment interest. That judgment also awarded a total of $7 million in punitive damages against Essef ($4.2 million to all the plaintiffs, including the Silivanches, to be divided later, and $2.8 million to Celebrity). The remaining plaintiffs then settled or tried their cases on the issues of causation and compensatory damages. Pet. App. 5a. The total compensatory damages awarded against Essef to all plaintiffs and cross-plaintiffs exceeded $4.8 million.

On November 7, 2001, the magistrate judge, having allocated the punitive damages award among the plaintiffs, issued a supplemental judgment awarding over $2.2 million in punitive damages to the Silivanches. On November 19, 2001, the judge severed Celebrity's remaining claims against Essef, and pursuant to Federal Rule of Civil Procedure 54(b) directed the clerk to enter final judgment in the plaintiffs' cases that had been successfully tried to verdict.

Because certain supplemental judgments were not properly forwarded to counsel and did not include postjudgment interest, the magistrate judge issued a superseding order on December 7, 2001 reopening the cases. On January 25, 2002 the magistrate judge signed separate "Second Supplemental Judgments" awarding post-judgment interest to plaintiffs receiving punitive damages. On the same day, the judge

issued a new Rule 54(b) order severing Celebrity's claims against Essef, and directing the entry of final judgment in favor of the plaintiffs in each case. The Rule 54 order was not entered on the *Silivanch* docket; rather, the clerk entered only the Second Supplemental Judgment on postjudgment interest on January 28, 2002. Pet. App. 6a.

On February 19, 2002, Essef's lawyer participated in a pre-argument telephone conference with a staff attorney in the Second Circuit to discuss an earlier appeal filed by a different plaintiff. Staff counsel at the court of appeals wanted to set a briefing schedule in that appeal that would correspond to the schedule that would govern the appeals that Essef and other parties indicated they intended to file. At that conference, Celebrity's lawyer represented that March 4, 2002 was the final date for filing the *Silivanch* appeals. The Essef lawyer marked March 4, 2002 in his calendar as the last day for filing a notice of appeal. Pet. App. 7a.

Essef filed a notice of appeal on March 1, 2002, which its counsel believed based on the notation in his calendar was three days prior to the deadline. Once Essef's counsel realized that more than 30 days had passed between the date of entry of the Second Supplemental Judgment on January 28 and the filing of the notice of appeal on March 1, Essef filed a motion for an extension of time in which to file its notice of appeal on the grounds of excusable neglect. After discovering that the Rule 54(b) order had not been entered in the *Silivanch* docket, Essef further argued that no appealable judgment had yet been entered in *Silivanch*. Pet. App. 8a-9a.

The district court held that the judgment was appealable as of January 28, 2002, but also held that Essef's late filing was excusable neglect and exercised its discretion to grant Essef's motion for an extension of time. The district court noted that this court had held that "[e]xcusable neglect may 'encompass situations in which failure to comply with a filing deadline is attributable to negligence.'" Pet. App. 31a (quoting *Pioneer*, 507 U.S. at 394). Nonetheless, the district court held that "the

prejudice to Essef of denying its motion would be significant, since it would be denied the opportunity to appeal a multimillion dollar verdict," whereas plaintiffs would suffer no additional hardship from the two-day delay. *Id.* at 32a. The order granting an extension of time was granted on May 15, 2002, and Essef filed a second notice of appeal on May 22, 2002.

On motion of the appellees, the Second Circuit nonetheless dismissed Essef's appeals as untimely. The court of appeals acknowledged that there was no entry of the Rule 54(b) order in the docket making the original and first supplemental judgment final. Nonetheless, the Second Circuit held that the "Rule 54(b) order was effective when it was signed and mailed to the parties, on January 25, 2002," and that the 30-day appeal period "began on the 28th, when the Second Supplemental Judgment in that case was set forth on a separate document and entered on the docket, and the period ended thirty days later on February 27." Pet. App. 15a.

Turning to the issue of excusable neglect, the court of appeals acknowledged that in *Pioneer* this Court had established a more liberal understanding of the "excusable neglect" standard. Pet. App. 16a. *Pioneer* required an "'equitable'" determination of "'all relevant circumstances surrounding the party's omission,'" including "'[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.'" *Id.* at 17a (alterations in original) (quoting *Pioneer*, 507 U.S. at 395). The court of appeals nonetheless held that because the first, second, and fourth factors generally favor the movant for an extension of time, the court of appeals would "focus[] on the third factor: 'the reason for the delay, including whether it was within the reasonable control of the movant.'" *Id.* at 17a-18a.

The court of appeals, relying on a prior circuit precedent, held that "where 'the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test.'" Pet. App. 18a. The court complained of "a regimen of uncertainty in which time limitations were not rigorously enforced," and stated that it takes a "hard line" on failures to make timely filings. *Id.* at 20a, 21a. The court of appeals refused to distinguish between mistakes of law in interpreting the rule, and mistakes of fact in applying the rule. *Id.* at 22a. The Second Circuit dismissed Essef counsel's erroneous reliance on another party attorney's calculation of the time period as a basis for excusable neglect because it was not an "exceptional" circumstance. *Id.* at 23a. Accordingly, the Second Circuit dismissed Essef's appeals.

Petitioners filed a petition for rehearing en banc, which the Second Circuit denied on August 28, 2003. Pet. App. 34a-35a. Shortly thereafter, Petitioners filed an application for a stay of the judgments below pending the filing of this petition for a writ of certiorari. The lower court granted that application on September 24, 2003, with instructions that the stay would automatically expire if this petition were not filed by the close of business on October 14, 2003.

REASONS FOR GRANTING THE PETITION

Review by this Court of the decision below is necessary to ensure the proper and uniform resolution of an important element of federal judicial procedure, *viz.*, the standard for excusable neglect. In an abrupt departure from precedents of numerous courts of appeals and of this Court, the Second Circuit held that a finding on a single *Pioneer* factor extinguishes a district court's discretion to weigh any other relevant factors. Its decision fundamentally restructures the "liberal" four-part balancing test this Court developed in *Pioneer*, and substitutes a restrictive and myopic focus on the reason for the delay. This approach forecloses a district

court's ability to engage in an equitable weighing of several factors. The Second Circuit's open disregard of this Court's rulings is a compelling ground, in and of itself, to justify review.

But a disregard for this Court's precedent is not all that justifies plenary review of the decision below. This case is an ideal vehicle for resolving three separate conflicts among the courts of appeals.

First, it squarely presents the controversy whether a court may elevate a single of the four *Pioneer* factors into a dispositive requirement, such that if it is not met a court is precluded from weighing the remaining factors or any other equitable consideration. On this question, the Second Circuit's decision deepens a mature split among the courts of appeals that this Court should resolve.

Second, the courts of appeals are in disagreement as to whether the third *Pioneer* factor – the reason for the delay – is the factor entitled to primary consideration, or whether the first and fourth *Pioneer* factors – prejudice to other parties and the efficient administration of justice – are the factors which merit the central focus. The Second Circuit's position that the reason for delay is dispositive conflicts with other courts of appeals which have held that the critical inquiries are prejudice to other parties and the efficient administration of justice.

Lastly, this case presents the additional conflict of what type of conduct of the responsible person is "excusable." The Second Circuit's holding that an attorney's good-faith "mistake of fact" in applying the rule is inexcusable stands in stark conflict with the position of both the Ninth and D.C. Circuits.

In sum, if left unreviewed, the decision below will eviscerate the equitable balancing test this Court announced in *Pioneer*, and deepen a split among the circuits surrounding the proper application of the factors enumerated in that case.

The Court should grant certiorari to make clear that a determination of excusable neglect requires an equitable balancing of several factors, and reject the Second Circuit's *per se* position which improperly restructures that analysis. Excusable neglect is a term of plain meaning, *Pioneer*, 507 U.S. at 388, that should not be the subject of conflicting standards in the federal courts. It simply is intolerable that some litigants' counsel will have their mistakes forgiven and their claims allowed to proceed while others will forfeit their rights, with the differences in outcomes purely the product of geography. Only this Court can ensure the uniformity that the federal rules were designed to achieve.

I. THIS COURT SHOULD CORRECT THE LOWER COURT'S FUNDAMENTAL RESTRUCTURING OF THE "EXCUSABLE NEGLECT" FRAMEWORK THIS COURT DEVELOPED IN *PIONEER*.

The Second Circuit's decision in this case directly conflicts with this Court's decision in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). In that case, this Court held that rules that empower a court to forgive missed filing deadlines for "excusable neglect" permit courts, "where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at 388. If the missed deadline resulted from neglect, the determination of whether the neglect is "excusable" is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." This Court provided a framework with which to analyze such claims, including four specific factors: (1) prejudice to other parties; (2) length of delay; (3) reason for delay; and, (4) effect on judicial proceedings. *Id.* at 395.

Although the Second Circuit recited the *Pioneer* factors, it then proceeded to treat three of these as purely superfluous. The Second Circuit's holding that a single *Pioneer* factor would be dispositive – "'the reason for the delay, including

whether it was within the reasonable control of the movant,'" Pet. App. 17a – directly conflicts with *Pioneer*. This focus renders superfluous all other factors, and is irreconcilable with this Court's directive that district courts undertake an equitable balancing of "all relevant circumstances," "includ[ing]" all four *Pioneer* factors. 507 U.S. at 395.

Even more fundamentally, this Court expressly rejected the Second Circuit's position (favored by the dissent in *Pioneer*) that "the factors relevant to this inquiry extend no further than the movant's culpability and the reason for the delay," excluding any consideration of prejudice or impact on judicial proceedings. *Id.* at 395 n.13; see also *id.* at 395 n.14 (rejecting position of dissent that factors of prejudice or impact on judicial proceedings could be considered only after "a threshold determination that the movant is 'sufficiently blameless' in the delay"). The Second Circuit's rule – focusing only on the reason for delay, and disregarding good faith and lack of prejudice – is even more stringent than that of the *Pioneer* dissent.

Finally, the "hard line" the Second Circuit espouses where good faith, lack of prejudice, and impact on judicial proceedings are irrelevant to an "excusable neglect" determination, Pet. App. 21a, contradicts this Court's "liberal understanding" of that standard, *Stutson*, 516 U.S. at 194. There is no way to square the holding below with this Court's clear holding that "the lack of any prejudice to the [other party] or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, *weigh strongly* in favor of permitting the tardy claim," *Pioneer*, 507 U.S. at 398 (emphasis added).[2]

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[2] This Court has noted that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect," *Pioneer*, 507 U.S. at 392, because parties are bound to discover the law. But here, there is no contention that Essef's lawyer acted inadvertently with regard to the existence of Federal Rule of Appellate Procedure 4, ignored the content of that rule, or mistakenly construed that

In sum, the decision below is flatly irreconcilable with governing case law. This Court should grant review in order to make clear that the analysis established in *Pioneer* requires the examination – and balancing – of several factors, and that the analysis cannot be truncated by bestowing dispositive status on a single factor.

II. THIS COURT SHOULD INTERVENE TO RESOLVE THE MULTIPLE AND MATURE SPLITS OF AUTHORITY CAUSED BY THE SECOND CIRCUIT'S DECISION.

The Second Circuit's ruling conflicts with the positions taken by a number of other circuits in three important respects. First, it is in conflict with those courts of appeals that have taken the position – faithful to *Pioneer* – that an equitable balancing of all relevant factors is required for a determination of "excusable neglect." Second, the position the decision below espouses – that the reason for delay is the dispositive factor – is in conflict with those circuits that accord primary weight to the first and fourth *Pioneer* factors, *viz.*, prejudice to the nonmovant and the efficient administration of justice. Lastly, the decision below departs from the decisions of other courts of appeals as to what type of conduct of the responsible person can be considered "excusable."

1. Unsurprisingly, the Second Circuit's ruling conflicts with a number of courts of appeals that are faithful to this Court's requirement that in assessing excusable neglect, district courts should undertake an equitable balancing of all relevant circumstances, including the four *Pioneer* factors.

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rule. By prohibiting a district court from finding excusable neglect when an attorney makes a mistake of fact in calculating the appeal period, Pet. App. 22a-23a, the Second Circuit has effectively rendered the "excusable neglect" standard of Rule 4 a nullity with no room to operate. Certainly, there is nothing in terms of culpability to distinguish a mistake of fact from any other type of neglect that might cause a notice of appeal to be untimely.

Indeed, the Second Circuit's position on this issue is in conflict with several other circuits which have expressly held that a district court must undertake a balancing of all *Pioneer* factors. These courts recognize that the standard established in *Pioneer* was "liberal" and elastic, and require a balancing of the equities.

In *Bateman* v. *United States Postal Service*, 231 F.3d 1220 (9th Cir. 2000), the Ninth Circuit reversed a district court's determination that an attorney's missed deadline did not constitute excusable neglect where that determination was based on an examination of only one factor. The district court had examined only the first of the *Pioneer* factors – the reason for the delay – and had neither considered nor addressed the remaining three. In reversing the lower court's determination, the Ninth Circuit held that whether an actor's conduct constitutes excusable neglect requires an equitable balancing of each of the four *Pioneer* factors, not simply a focus on one factor. See *id.* at 1224. Making a determination based on "just one of the *Pioneer* . . . considerations" amounted to a "fail[ure] to conduct the equitable analysis laid out in *Pioneer*." *Id.* In the Ninth Circuit's view, the district court's approach (which mirrors the approach of the Second Circuit) amounted to "omitting the correct legal standard altogether." See *id.*; *accord Briones* v. *Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997) (per curiam) (holding that the four *Pioneer* factors provide the framework to assess "excusable neglect").

Like the Ninth Circuit, the Third Circuit has adopted a position faithful to *Pioneer*'s directive – thus putting it, too, squarely in conflict with the Second Circuit. In *In re Orthopedic Bone Screw Products Liability Litigation*, 246 F.3d 315 (3d Cir. 2001), the Third Circuit reversed a district court's determination that the excusable neglect standard was not met where that determination was based on a sole *Pioneer* factor. Noting the "equitable nature" of the inquiry set forth in *Pioneer*, the Third Circuit held that the excusable neglect

analysis requires a careful balancing of all equitable factors, an "analysis [which] eschews any *per se* rule" based on a single factor. *Id.* at 322, 329.

Finally, the Fifth Circuit, too, takes the position, contrary to the Second Circuit, that a determination of excusable neglect depends on an analysis of each of the four *Pioneer* factors. See *In re Eagle Bus Mfg., Inc.*, 62 F.3d 730, 736-40 (5th Cir. 1995) (affirming lower court's determination of "excusable neglect" by reviewing facts of case against each of *Pioneer*'s four factors).

It is clear that if the district courts in the Ninth, Third or Fifth Circuits had done precisely what the Second Circuit did here, their judgments would have been reversed. Similarly, if the district court had been located in California, Pennsylvania or Texas, its decision to allow this appeal would have been affirmed. This Court should resolve this fundamental decisional conflict on an important doctrine of civil procedure in the federal courts.

2. The controversy among the courts of appeals as to whether a single *Pioneer* factor may be dispositive is not the only conflict this Court should intervene to resolve. The decision below deepens an additional, and equally direct, split of authority over which of the four *Pioneer* factors are entitled to the greatest weight in an excusable neglect analysis.

On one side of the legal divide are those courts of appeals that, in conflict with the Second Circuit's decision, place the most emphasis on prejudice to other parties and impact on judicial proceedings. For example, in *Cheney* v. *Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996), the Eleventh Circuit held the first and fourth *Pioneer* factors are the critical factors in any excusable neglect analysis. Although recognizing the remaining *Pioneer* factors could not be disregarded (unlike the Second Circuit below), the Eleventh Circuit held that prejudice and efficient judicial

administration were the *Pioneer* factors entitled to "primary importance." *Id.*; *accord In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1297 (11th Cir. 2003) (absence of prejudice to nonmoving party and to interest of efficient judicial administration are factors entitled to primary importance).

Like the Eleventh Circuit, the Seventh Circuit – in conflict with the Second Circuit – has held that prejudice and the efficient administration of justice are the critical factors in an excusable neglect analysis. In *United States* v. *Brown*, 133 F.3d 993, 996 (7th Cir. 1998), for example, the Seventh Circuit observed that a district court must conduct an equitable balancing of all *Pioneer* factors. However, it went on to hold that among those factors, prejudice to the nonmovant and efficient judicial administration were entitled to "special consideration." *Id.* (citing *Pioneer*, 507 U.S. at 398). The Seventh Circuit's language in *Brown* reveals just how direct the conflict with the Second Circuit is: the Seventh Circuit made clear that the reason for delay was neither "the only . . . [nor] the most important" factor in determining equitable neglect. *Id.* at 997.

On the other side of the legal divide are those courts of appeals that, like the Second Circuit, hold that special weight should be accorded the reason-for-delay factor. For example, in *Lowry* v. *McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000), the Eighth Circuit explicitly held that of the four *Pioneer* factors, the reason for the delay must be accorded the greatest import. *Accord Gibbons* v. *United States*, 317 F.3d 852, 854 (8th Cir. 2003). Likewise, the First and Sixth Circuits have held that the reason for delay is the chief consideration. See *Graphic Communications Int'l Union, Local 12-N* v. *Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001); *United States* v. *Thompson*, 82 F.3d 700, 702-03 (6th Cir. 1996).[3]

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[3] Even among those circuits that engage in a weighting of the *Pioneer* factors, each one – with the exception of the Second Circuit – nonetheless

These cases establish the existence of a widening split of authority over which factors recognized by this Court in *Pioneer* are entitled to the greatest weight in an excusable neglect analysis. The Second Circuit's position on this issue is directly and irreconcilably contrary to the position taken by other courts of appeals, and thus presents a proper vehicle for this Court to resolve this conflict.

3. There is an additional divide over what type of conduct is deemed "excusable" for purposes of the third *Pioneer* factor, *i.e.*, the reason-for-delay. The Second Circuit's holding, that an attorney's good-faith mistake of fact in applying a rule is *per se* inexcusable, conflicts with the rule in both the Ninth and D.C. Circuits.

The Ninth Circuit has squarely held that conduct *is* excusable if the reason for the delay suggests, as in the case of Essef's counsel, mere negligence or carelessness. In *Bateman*, the Ninth Circuit analyzed whether an attorney's reason for delay – that he left the country despite knowing a pleading would be due in his absence – was the type of conduct that could constitute excusable neglect. In finding that it was, the Ninth Circuit held that – in the absence of prejudice, substantial delay, and impact on judicial proceedings – negligent conduct that did not reflect "deviousness or willfulness" was encompassed in the spectrum of what type of conduct could be deemed "excusable." 231 F.3d at 1224-25.

Like the Ninth Circuit, the D.C. Circuit has held that a good-faith mistake is excusable for purposes of the third

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recognizes that a finding on what that circuit deems the key factor does not relieve a court of its obligation to balance the remaining factors. *See Lowry*, 211 F.3d at 463 (although reason-for-delay is factor entitled to most weight, a finding on that factor "is not a condition precedent to our obligation to consider the other equitable factors."); *Brown*, 133 F.3d at 996 (noting that prejudice and efficient judicial administration are key factors, but nonetheless balancing remaining *Pioneer* factors); *Cheney*, 71 F.3d at 850 (same).

Pioneer factor. In *Yesudian ex rel. United States* v. *Howard University*, 270 F.3d 969 (D.C. Cir. 2001), that court confronted whether an attorney who mistakenly relied on the local rules in lieu of the federal rules had committed excusable neglect. After extensively analyzing each *Pioneer* factor, the Court held that even an attorney's "[f]oolish" mistake can constitute "excusable" conduct. See *id.* at 971.

The D.C. Circuit recently had occasion to reiterate its position on this issue in *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207 (D.C. Cir. 2003). In that case, it expressly declined to adopt a rule that "garden variety . . . inattention can never constitute excusable neglect." *Id.* at 1209. In so concluding, the D.C. Circuit observed that the framework this Court developed in *Pioneer* precluded the adoption of any such *per se* rule. According to the D.C. Circuit, "*Pioneer* purposely fashioned a flexible rule which, by its nature, counsels against the imposition of a *per se* rule on attorney neglect." *Id.* Only months later, the Second Circuit adopted the opposite position in this case.

In stark contrast to the position taken by the Ninth and D.C. Circuits, the Second Circuit has embraced its "hard line" position that certain types of neglect, including a mistake of fact in determining a deadline, cannot be excused even in the absence of delay, prejudice or impact on judicial proceedings. This Court should grant review of the decision below in order to provide guidance to the lower courts as to what type of conduct of the responsible person is excusable.

Given the prevalence of the "excusable neglect" standard in the federal rules and statutes governing judicial procedure, see *Pioneer*, 507 U.S. at 391-95, this Court has recognized that conflicts in the interpretation of that standard cannot be allowed to persist. *Id.* at 387. The decision below is irreconcilable with *Pioneer* and decisions of other circuits, and robs the district courts of the equitable discretion that this Court has stated is the hallmark of "excusable neglect"

determinations. *Id.* at 395. Accordingly, this Court's review is imperative.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 14, 2003

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket Nos. 02-7229, 02-7279, 02-7320, 02-7595, 02-7600, 02-7603, 02-7604, 02-7606, 02-7607.

JOHN AND JOYCE SILIVANCH, FELICE AND FRANCES DEFRANCESCO, RAYMOND AND MARY HAGUE, CAROL AND RICHARD LORENZO,
Plaintiffs-Appellees-Cross-Appellants,

DOROTHY CANTONE, KEVIN L. JENKINS, WILLIAM, KATHLEEN, WILLIAM JR., AND KIMBERLY BUCK, RONALD AND SIMA CESARSKI, MICHAEL AND DORIS SCKIPP, FRAN AND RITA GALANTE, MARY AND LOUIS B. MONTES, JANE KING, CLARE DILLON, AND MARY PURCELL,
Plaintiffs-Appellees,

v.

CELEBRITY CRUISES, INC., AND FANTASIA CRUISING, INC.,
Defendants-Cross-Appellants,

v.

ESSEF CORP., PAC-FAB, INC., AND STRUCTURAL EUROPE, N.V. (F/N/A SFC),*
Defendants-Appellants-Cross-Appellees.

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* Numerous other defendants, third-party-defendants, cross-defendants, cross-claimants, counter-claimants, and counter-defendants appear on this Court's many docket sheets for these appeals. We follow the convention of the district court and parties and refer only to those parties who have been actively represented with respect to the motion to dismiss the appeal that is the subject of this opinion. We also disregard what appear to have been several changes of name and structure among defendants that are apparently related to Essef Corp. and represented by its counsel.

Argued: Sept. 24, 2002.
Decided: June 25, 2003.

Before: FEINBERG and SACK, Circuit Judges, and MURTHA, District Judge.**

SACK, Circuit Judge.

Plaintiffs-Appellees-Cross-Appellants (the "plaintiffs") move to dismiss appeals filed by Defendants-Appellants-Cross-Appellees Essef Corporation, Pac-Fab, Inc., and Structural Europe, N.V. (collectively "Essef") and cross-appeals filed by Defendants-Cross-Appellants Celebrity Cruises, Inc., and Fantasia Cruising, Inc. (collectively "Celebrity") from a mass tort action heard in the United States District Court for the Southern District of New York. The plaintiffs contend that we lack jurisdiction to hear the appeals because Essef did not file a notice of appeal within thirty days after judgment was entered as required by Fed.R.App.P. 4(a)(1). Essef relies on an extension of the time to file granted by the district court (James C. Francis IV, *Magistrate Judge*) under Fed.R.App.P. 4(a)(5) after the court found that the neglect that resulted in Essef's tardiness was excusable. The plaintiffs argue that Essef's neglect was not excusable and that the district court abused its discretion in holding otherwise. For the reasons set forth below, we agree with the plaintiffs.

In addition, Essef contends that the judgments appealed from did not become final and the time to appeal did not begin to run until the district court entered its Fed.R.Civ.P. 54(b) order on the docket in *Silivanch,* the "bellwether" case, which it did not do until after we held argument with respect to these motions. Essef bases this contention on the fact that

** The Honorable J. Garvan Murtha, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

although an order under Fed.R.Civ.P. 54(b), which directed that the judgment from which appeal was being sought was final and therefore appealable, was signed by the magistrate judge on January 25, 2002, and mailed to the parties, there was not then an entry in the docket for the "bellwether" action reflecting the issuance of the order. We conclude that the Rule 54(b) order was effective when it was signed and issued, even though it was not then entered in the "bellwether" action docket.

We therefore dismiss the appeals and cross-appeals for want of appellate jurisdiction.

BACKGROUND

The action before us arose from a 1994 outbreak of Legionnaires' Disease on board Celebrity's cruise ship Horizon. The United States Centers for Disease Control and Prevention traced the outbreak to the presence of *legionella* bacteria in filters designed, manufactured, and distributed by Essef that were operated in connection with the ship's whirlpool spa. Water from the spa passed through silica sand and gravel within the filters, cleansing it of hair, dirt, and oils. Beneath the gravel, each filter contained a hub from which "laterals" radiated like the spokes of a wheel. Filtered water returned to the spa via holes in the laterals.

The filters were designed to be cleaned by running them in reverse. Water was forced through the laterals and up through the gravel and sand, dislodging built-up waste material. Waste water from this "backwashing" process was then thrown overboard.

According to the evidence adduced at trial, the filters did not backwash properly. Instead of lifting the entire sand bed and cleansing each grain, water flowed primarily through the center of each filter and failed to clean the outer edges. As waste material built up in the filters, "biofilms" of organic material formed. These biofilms trapped the *legionella* inside

the filters, protecting the bacteria from disinfectants while providing a growth medium. The bacteria proliferated. As water containing the bacteria was released back into the whirlpool, it was aerosolized and inhaled by passengers in and near the spa.

Many victims of the outbreak, their families, and their estates, including these plaintiffs, subsequently brought suit against Celebrity and Essef for their injuries and those of their relatives. Celebrity, in turn, filed cross-claims against Essef for indemnification and other damages.

By the end of 1995, at least twenty-two separate such actions had been filed. All of the related cases were assigned to United States District Judge Lawrence M. McKenna in the United States District Court for the Southern District of New York. Judge McKenna ordered the cases consolidated for discovery before Magistrate Judge Francis who, with the consent of the parties pursuant to 28 U.S.C. § 636(c), was later designated to conduct all proceedings in the matter, including the entry of final judgments. Over the next several years, discovery proceeded. During that period, some of the plaintiffs settled with Celebrity and Essef.

In May 2000, the remaining plaintiffs, Celebrity, and Essef agreed to resolve the entire matter before Magistrate Judge Francis using a "bellwether" procedure. One case—the "bellwether"—brought by John and Joyce Silivanch, would be tried to a jury on all issues. The jury would determine if Celebrity, Essef, or both were liable for the Silivanches' injuries. If the jury found such liability, it would determine each defendant's proportional liability and Celebrity's right of indemnification against Essef, if any, with regard thereto, in addition to the amount of the Silivanches' compensatory damages. It would also determine each defendant's liability for any punitive damages to all the plaintiffs as a group. The *Silivanch* jury's findings on all issues, other than proximate cause with respect to the Silivanches' injury and com-

pensatory damages to be awarded to them, would be binding in all of the remaining cases, each of which would be tried separately on the reserved two issues. Any punitive damages awarded in the bellwether trial would be allocated by the court among the various plaintiffs.

In June 2000, the jury returned a verdict finding the defendants liable to the Silivanches. It also found that Essef had an obligation to indemnify Celebrity in full. The jury awarded $4,200,000 in punitive damages to the plaintiffs, and another $2,800,000 to Celebrity, all to be paid by Essef.

The remaining plaintiffs then settled or tried their cases on the issues of causation and compensatory damages. Afterward, the district court apportioned the punitive damages award among those plaintiffs who had established the requisite proximate causation at trial, or against whom such causation had not been contested because of definitive medical evidence.

In November 2001, the district court severed Celebrity's remaining claims against Essef, and, pursuant to Fed.R.Civ.P. 54(b),[1] directed the clerk of the court to enter final judgment

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[1] Rule 54(b) reads in its entirety:

> *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed.R.Civ.P. 54(b).

in, and close, some or all of the plaintiffs' cases. Supplemental judgments as to punitive damages were signed by the magistrate judge, issued, and docketed for each plaintiff who was awarded punitive damages.

Shortly thereafter, on December 7, 2001, however, the district court ordered the clerk to reopen the cases that had been closed because the supplemental judgments "in many of the related cases . . . ha[d] not been forwarded to counsel, and certain parties ha[d] raised the issue of post-judgment interest." Order dated Dec. 7, 2001.

On January 25, 2002, after ruling on post-judgment interest, the magistrate judge signed a new Rule 54(b) order severing Celebrity's claims against Essef, and directing the entry of final judgment in favor of the plaintiff or plaintiffs in each case. The orders, highly similar although individualized for each set of parties, were mailed to counsel and entered on each docket except, inexplicably, the docket for *Silivanch.*

Also on January 25, 2002, the magistrate judge signed separate "Second Supplemental Judgments" ordering post-judgment interest for each plaintiff or group of plaintiffs that had been allocated punitive damages. Additionally, the Second Supplemental Judgments alluded to Rule 54(b) and recited the prior compensatory awards, prejudgment interest, and punitive damages awards for each plaintiff. They were docketed in each case shortly thereafter. The *Silivanch* docket contains a January 28 entry that refers to the judgment signed on January 25:

> SECOND SUPPLEMENTAL JUDGMENT # 00,1990: that there being no just reason for delay, purs. to FRCP 54(b), pltffs be awarded postjudgment interest on the principal amount of $5,892,719.80 from 9/6/00, until final payment is made, at the rate of 6.241 percent, compounded annually. (signed by Magistrate Judge

> James C. Francis IV); Mailed copies and notice of right to appeal. Entered on Docket: 1/28/02. (kg) [Entry date 01/28/02].

(brackets in original.) As noted on the docket, the judgments were mailed to counsel along with "right to appeal" notices.

On February 5, 2002, Robert A. Jacobs, the Silivanches' lawyer, wrote to Essef's lawyer, Robin G. Weaver, raising the issue of Essef's appeal bond. Jacobs' letter mentioned that "final judgment" had been entered on January 28. Weaver responded on February 8, acknowledging receipt of Jacobs' letter. The two lawyers had conversations in which, according to Jacobs, Weaver acknowledged that judgment had been entered on January 28.

On February 19, some three weeks after the Second Supplemental Judgments had been entered, counsel for Celebrity (James M. Hazen), Essef (Weaver), and the Lorenzo, Hague, and DeFrancesco plaintiffs (Brendan Burke), conducted a pre-argument telephone conference with Second Circuit staff counsel regarding a separate appeal filed by the Lorenzos. During the conference, staff counsel sought to set a briefing schedule that would take into account the timing of Essef's expected appeals in the other cases, and asked the lawyers when they would know whether they were pursuing such other appeals. According to Hazen, he "posited" March 4, 2002, as the "control date" for the *Silivanch* appeals, but had not actually calculated the deadline himself because Celebrity intended to appeal only if Essef did. Hazen Decl. dated Apr. 15, 2002, at ¶ 6. Based on Hazen's statement, Essef lawyer Weaver noted March 4 in his calendar as the last day for filing a notice of appeal.

Fed.R.App.P. 4(a)(1)(A) requires parties to file notices of appeal "within 30 days after the judgment or order appealed from is entered." Under it, Essef's time to appeal expired on February 27, 2002, thirty days after the January 28 entries of

the Second Supplemental Judgments. On March 1, thirty-*two* days after those judgments had been entered, Essef filed a notice of appeal under the *Silivanch* caption and master-file docket number listing a January 28, 2002, order as the latest judgment appealed from.

On March 29, 2002, Essef's counsel having realized that more than thirty days had passed between the entry of the Second Supplemental Judgment in *Silivanch* and the filing of the notice of appeal, Essef filed a motion in the district court requesting, *inter alia,* an extension of time to file a notice of appeal pursuant to Fed. R.App. P. 4(a)(5).[2] In its motion, Essef asserted that it had filed its notice of appeal late because its counsel had been misled by Hazen's statement that the deadline was March 4, and that counsel's mistake "persisted because Essef received no written notice from the Court or any party that judgment was in fact entered on January 28, 2002." Essef Mot. to Reopen the Time in Which to File a Notice of Appeal dated Apr. 3, 2002, at 2. Shortly thereafter, Essef raised its contention that the time for filing a

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[2] Fed.R.App.P. 4(a)(5) reads in pertinent part:

> *Motion for Extension of Time*
>
> (A) The district court may extend the time to file a notice of appeal if:
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> . . . .
>
> (ii) . . . [a] party shows excusable neglect or good cause.
>
> (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.
>
> (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(emphasis in original).

notice of appeal had not yet begun to run because the second Rule 54(b) order had never been entered in the *Silivanch* docket despite the fact that *Silivanch* was the bellwether case.

On May 8, 2002, the district court heard oral argument on Essef's motions. At the hearing, Essef abandoned its argument that it had never received notice of the Second Supplemental Judgments. It argued instead that no appealable judgment had been entered, and pressed its claim of "excusable neglect based on . . . the state of the docket, the confusion," and Hazen's statement that the deadline was March 4. Tr. of May 8, 2002, Hearing, at 29.

The district court granted Essef's motion, concluding that Essef's late filing in reliance on Hazen's statement constituted "excusable neglect" under Fed.R.App.P. 4(a)(5)(A)(ii). *In re: Horizon Cruises Litigation,* Nos. 94 Civ. 5270; 94 Civ. 6147; 95 Civ. 0374, slip op. (S.D.N.Y. May 15, 2002) ("*Horizon Cruises Litigation*"). The court rejected Essef's argument that an appealable judgment had not yet been entered, however, describing this argument as "an after-the-fact rationalization that is inconsistent with the record and with the contemporaneous understanding of all the parties." *Id.* at 6 n. 3.

Essef filed a new notice of appeal on May 22, 2002, under the *Silivanch* caption and docket number listing the other plaintiffs' cases as related and also being appealed, and filed initial notices of appeal in those other cases too. Celebrity filed cross-appeals shortly thereafter. The plaintiffs then filed these motions to dismiss the appeals and cross-appeals as untimely.

On September 25, 2002, one day after these motions were argued before us, the clerk of the district court entered the January 25 Rule 54(b) order in the *Silivanch* docket. Essef then filed a third notice of appeal virtually identical to its second.

Before us, then, are the plaintiffs' motions to dismiss the appeals and cross-appeals on the ground that the district court abused its discretion by granting the Rule 4(a)(5) motion for an extension of time. We conclude that it did, and therefore dismiss the appeals and cross-appeals.

DISCUSSION

I. Standard of Review

"A district court's order granting or denying motions under Fed.R.App.P. 4(a)(5) is reviewed for abuse of discretion." *Goode v. Winkler*, 252 F.3d 242, 245 (2d Cir.2001) (per curiam). Such an order "cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion that it reached upon a weighing of the relevant factors." *In re O.P.M. Leasing Servs., Inc.*, 769 F.2d 911, 915 (2d Cir.1985) (citation and internal quotation marks omitted).

II. Legal Landscape

Essef bases its opposition to the motions to dismiss its appeal on two primary contentions. It asserts that no order is effective until it is docketed, and therefore its notice of appeal was timely because it was filed before the district court's Rule 54(b) order was entered in the *Silivanch* docket. It also defends the district court's finding that Essef's neglect—i.e., Essef's counsel's reliance on a statement made by opposing counsel that the deadline was March 4, 2002, instead of calculating the deadline himself—was "excusable" under Rule 4(a)(5).

Ordinarily, only the final judgment of a district court is appealable. 28 U.S.C. § 1291; *but cf. id.* § 1292 (granting appellate jurisdiction over certain provisional equitable remedies and controlling questions of law certified by district courts). Under Rule 54(b), an order or judgment that resolves some but not all of the claims of all of the parties does "not

terminate the action as to any of the claims or parties," Fed.R.Civ.P. 54(b), and is therefore not final and immediately appealable. When multiple claims are involved and one or more of them have been resolved, however, a district court may "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties" if the court finds that there is "no just reason for delay," *id.*, at which time the judgment or judgments become appealable.

According to the rules in effect during the district court proceedings, every judgment, whether or not pursuant to a Rule 54(b) certification, was "effective only when ... set forth [on a separate document] and when entered as provided in Rule 79(a)." Fed.R.Civ.P. 58 (as in effect until December 1, 2002);[3] *Cooper v. Town of East Hampton*, 83 F.3d 31, 34 (2d Cir.1996) ("Th[is] mechanistic requirement[ ], while seemingly trivial, [is] necessary to the goal of promoting clarity. Litigants must be able to determine when a judgment is a judgment for the purpose of appeal . . . ."). The "separate document" mandated by Rule 58 must be "separate from any judicial memorandum or opinion" and "must be labeled a 'judgment.'" *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir.1993). And Fed.R.Civ.P. 79(a) requires the clerk of the court to enter every order or judgment in a case into that case's docket.

A party seeking to appeal a civil judgment must (with exceptions not applicable here) file a notice of appeal with the district court clerk, Fed.R.App.P. 3(a)(1), "within 30 days after the judgment or order appealed from is entered," *id.* 4(a)(1)(B); *see Endicott Johnson Corp. v. Liberty Mut. Ins.*

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[3] Rule 58 was substantially revised by amendments effective December 1, 2002. Among other things, the new Rule 58 clarifies when a separate judgment is unnecessary. Fed.R.Civ.P. 58(a)(1) (as amended, December 1, 2002). If a judgment does require a separate document, the judgment is deemed entered 150 days after it is entered in the docket, even if no separate document has been issued. *Id.* 58(b)(2).

Co., 116 F.3d 53, 55 (2d Cir.1997). The thirty-day period does not begin to run until a judgment is issued on a separate document and entered in the docket, Fed.R.App.P. 4(a)(7) (as in effect until December 1, 2002),[4] and the judgment is or becomes final, *see FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 275-76, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991) (holding that a notice of appeal filed before any appealable judgment has been entered becomes effective when an entered judgment becomes appealable).

Compliance with Rule 4(a) is "mandatory and jurisdictional." *Endicott Johnson Corp.*, 116 F.3d at 55 (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (per curiam) (citation and internal quotation marks omitted)). If no notice of appeal is filed before the deadline provided by Rule 4(a)(1) (or a new deadline set pursuant to Rule 4(a)(5) or (6)), this Court lacks jurisdiction to hear the appeal. *See Griggs*, 459 U.S. at 61, 103 S.Ct. 400 (finding that a notice of appeal filed outside the time limits prescribed by Rule 4(a) is a "nullity," and that a timely notice of appeal is jurisdictional).

"The power of the federal courts to extend this time limitation is severely circumscribed." *Endicott Johnson Corp.*, 116 F.3d at 56. In most civil cases, there are only two potential methods for doing so. Fed.R.App.P. 4(a)(6) allows district courts to "reopen the time to file an appeal" if a party did not receive notice that judgment had been entered. And Fed.R.App.P. 4(a)(5) allows the district court to "extend the time to file a notice of appeal" if a party "shows excusable neglect or good cause."

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[4] Rule 4(a)(7) was amended in 2002 to follow the simultaneous amendments to Rule 58. *See supra* note 3. Under the amended rule, a judgment becomes final and the thirty-day period begins when it is docketed and issued in a separate document, or 150 days after the judgment is entered, even if it has not been issued in a separate document.

Under Rule 4(a)(1), the time in which to file an appeal does not begin to run until all of the requirements of Fed.R.Civ.P. 58 have been satisfied. Fed.R.App.P. 4(a)(1)(A) ("the notice of appeal . . . must be filed . . . within 30 days after the judgment or order appealed from is entered"); *id.* 4(a)(7) (as in effect until December 1, 2002) (defining "entry" as compliance "with Rules 58 and 79(a)" of the Federal Rules of Civil Procedure). Prior to the 2002 amendments to the federal rules, the Rule 4(a)(1) period in which to file a notice of appeal therefore did not begin to run until a Rule 58 judgment was issued on a separate document and entered on the docket and, if any claims in the case remained unresolved, was certified as final pursuant to Rule 54(b). *See generally* Michael Zachary, *Rules 58 and 79(a) of the Federal Rules of Civil Procedure: Appellate Jurisdiction and the Separate Judgment and Docket Entry Requirements,* 40 N.Y.L. Sch. L.Rev. 409 (1996).

The interplay of these rules provides the basis for Essef's two contentions in response to this motion: (1) that the judgment in *Silivanch* did not become final or appealable until the Rule 54(b) order was entered into the docket for that case because under Rule 79(a) orders do not become effective until they are docketed, and (2) that its neglect in failing to file a notice of appeal within thirty days of the entry of the Second Supplemental Judgment in *Silivanch* is excusable under Rule 4(a)(5).

III. Failure to Docket the Rule 54(b) Order in *Silivanch*

Essef asserts that no order is effective until it is entered in the docket, and that the Rule 54(b) certification in *Silivanch* therefore did not become effective, the Second Supplemental Judgments did not become appealable, and the time to appeal under Rule 4(a)(1) did not start to run, until the certification was docketed in *Silivanch* on September 25, 2002.

It is undisputed that the judgment from which Essef sought to appeal—the Second Supplemental Judgment in *Silivanch*—was set forth in a separate document, and entered on the docket on January 28, 2002. The only other requirement to start the time for filing of the notice of appeal running was the Rule 54(b) certification, which rendered the Second Supplemental Judgment final and therefore appealable. Essef argues that Rule 54(b) certifications, like Rule 58 judgments, are not effective until they are entered in the docket and points out that the Rule 54(b) certification in *Silivanch* was not *docketed* until much later. That is of no moment. There is no requirement that such a certification be docketed in order for it to become effective for these purposes. With respect to such certifications, the rules require only that a court make certain "express determination[s]" and "direct the entry of a final judgment." Fed.R.Civ.P. 54(b). To become effective, certifications—unlike final judgments—do not require entry in the docket.

Fed.R.Civ.P. 79(a) indeed does call for the entry of all "orders, verdicts, and judgments" in the docket, but the reason for the requirement is the docket's "public record keeping function." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 n. 4, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (per curiam) ("[u]nlike the separate-document requirement . . . the keeping of a civil docket pursuant to Rule 79 fulfills a public recordkeeping function"). The rule is directed to the clerk, not to the parties or the court. *See* Fed.R.Civ.P. 79(a).

In *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 (2d Cir.1997), we rejected the idea that an undocketed order was a nullity despite a local rule stating that "notation in the appropriate docket . . . shall constitute the entry of the order." *Id.* at 909-10 (quoting S.D.N.Y. Civ. R. 6(a)). As we said in *Lightfoot*, the requirement that orders be entered in the docket is no more than "a ministerial rule of procedure, intended to

ensure that case dockets are properly maintained as useful sources of information for the litigants and court personnel." *Id.* at 910.[5]

The *Silivanch* Rule 54(b) order was effective when it was signed and mailed to the parties, on January 25, 2002. The Rule 4(a)(1) period began on the 28th, when the Second Supplemental Judgment in that case was set forth on a separate document and entered on the docket, and the period ended thirty days later on February 27. Because Essef's notice of appeal was not filed until two days thereafter, it was untimely and we lack jurisdiction to hear Essef's appeal unless Essef satisfactorily took advantage of one of the exceptions provided by Rule 4(a).

IV. Excusable Neglect

The district court decided that Essef's neglect in failing to file a timely notice of appeal was excusable under Fed. R.App.P. 4(a)(5) because of Essef's counsel's reliance on

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[5] Other courts have treated the significance of docket entries similarly. *See, e.g., Noli v. Commissioner*, 860 F.2d 1521, 1525 (9th Cir.1988) (holding an oral order binding and effective despite the court's failure to enter it on the docket); *In re Saunders,* 240 B.R. 636, 644 (S.D.Fla.1999) ("[p]arties should be able to reasonably rely on a written order, signed by a Judge, that the party has actually received, even if this Order does not get docketed"); *see also United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 235-36, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958) ("a formal judgment . . . signed by the judge . . . is prima facie the decision or judgment rather than a statement in an opinion or a docket entry.") (quoting *United States v. Hark*, 320 U.S. 531, 534-35, 64 S.Ct. 359, 88 L.Ed. 290 (1944)); Zachary, *supra*, at 434-40, 442-50 (concluding that the docket entry requirement is not jurisdictional with respect to judgments).

In *In re American Precision Vibrator Co.*, 863 F.2d 428, 429 (5th Cir.1989), the court did note that "[o]rders do not become final until they are docketed," but as Judge Kaplan pointed out in *In re Rezulin Products Liability Litigation*, 133 F.Supp.2d 272, 298 (S.D.N.Y.2001), *American Precision Vibrator* "is distinguishable because the dismissal order [in that case] was appealable and therefore governed by Rule 58."

Celebrity's counsel's statement during a pre-argument scheduling conference that the deadline for filing was March 4. Essef also argued that it was excusable because the lateness also resulted from confusion in the records and dockets of these cases.

We have observed:

> Prior to the Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), we adhered to a firm rule that the excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules. . . .
>
> In *Pioneer*, however, the Supreme Court established a more liberal standard for determining whether there had been 'excusable neglect.' Although *Pioneer* interpreted "excusable neglect" in the context of Bankruptcy Rule 9006(b)(1), the Court analyzed that term as it is used in a variety of federal rules, including Rule 60(b)(1). For that reason, we have held that *Pioneer's* "more liberal" definition of excusable neglect is applicable beyond the bankruptcy context where it arose.

Canfield v. Van Atta Buick/GMC Truck Inc., 127 F.3d 248, 249-50 (2d Cir.1997) (per curiam), *cert. denied*, 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed.2d 117 (1998) (quoting *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir.1994) (other citations and internal quotation marks omitted)), *cert. denied*, 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed.2d 117 (1998); *see also United States v. Hooper*, 9 F.3d 257, 259 (2d Cir.1993) (applying *Pioneer* to extensions of time to file notices of appeal under Fed.R.App.P. 4(b), noting that the case "draws upon the use of ['excusable

neglect'] in other federal rules," and "nothing . . . limits its interpretation . . . to the Bankruptcy Rules").[6]

In *Pioneer,* the Supreme Court referred to "excusable neglect" as an "elastic concept," 507 U.S. at 392, 113 S.Ct. 1489 (internal quotation marks omitted), implying a determination that is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission," *id.* at 395, 113 S.Ct. 1489. Factors to be considered in evaluating excusable neglect include "[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.*

In the typical case, the first two *Pioneer* factors will favor the moving party: "[D]elay always will be minimal in actual if not relative terms, and the prejudice to the non-movant will often be negligible, since the Rule requires a 4(a)(5) motion to be filed within thirty days of the last day for filing a timely notice of appeal." *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir.), *cert. denied*, 531 U.S. 929, 121 S.Ct. 309, 148 L.Ed.2d 248 (2000). And rarely in the decided cases is the absence of good faith at issue. *See id.* But despite the flexibility of "excusable neglect" and the existence of the four-factor test in which three of the factors usually weigh in favor of the party seeking the extension, we and other circuits have focused on the third factor: "the reason for the delay, including whether it was within the

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[6] The term "excusable neglect" appears frequently in the United States Code and Federal Rules as a basis for motions to extend time limitations. *See, e.g.*, 2 U.S.C. § 394(c)(2); 28 U.S.C. § 2107(c); Fed. R. Bkrtcy. P. 7013, 8002(c)(2) & 9033(c); Fed.R.Crim.P. 45(b)(1)(B); Fed.R.Civ.P. 6(b)(2), 13(f) & 60(b)(1).

reasonable control of the movant."[7] *Pioneer*, 507 U.S. at 395, 113 S.Ct. 1489. We have noted that the equities will rarely if ever favor a party who "fail[s] to follow the clear dictates of a court rule" and held that where "the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test." *Canfield*, 127 F.3d at 250-51 (holding not clearly erroneous the district court's decision that a lawyer's failure to file motion papers within the time limit established by a local rule was not excusable neglect under Rule 60(b)); *accord United States v. Hooper*, 43 F.3d 26, 28-29 (2d Cir.1994) (per curiam) ("*Hooper II*") (affirming denial of Rule 4(b) extension where delay resulted from legal assistant's ignorance of the rules); *Weinstock*, 16 F.3d at 503 (affirming denial of Rule 4(a)(5) extension where delay was due to a misunderstanding of the rules, even though the rule in question was "a 'trap' for the unsuspecting litigant" and had been amended for that reason prior to our decision).

A. The Statement During the Scheduling Conference That the Deadline Was March 4

Although the last day for Essef's filing of its notice of appeal was February 27, thirty days after the entry of the Second Supplemental Judgment in *Silivanch*, Essef filed its notice of appeal on March 1, 2002. The district court found that "[d]uring [the scheduling] conference [with respect to the *Lorenzo* appeal], counsel for Celebrity stated that the deadline

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[7] *See also Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5-6 (1st Cir.2001) ("Although the *Pioneer* standard is more forgiving than the standard in our prior case law, there still must be a satisfactory explanation for the late filing. . . . [T]he four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a close[ ] case, the reason-for-delay factor will always be critical to the inquiry.") (citation, internal quotation marks and final ellipsis omitted).

for appealing from the Second Supplemental Judgment was March 4, 2002. In reliance on that erroneous calculation, Essef did not file its notice of appeal until March 1, which was beyond the deadline." *Horizon Cruises Litigation*, slip op. at 1 (citations to the record omitted). We have no basis on which to conclude that those findings were erroneous, let alone clearly so.

The district court concluded that Essef's late filing therefore resulted from "excusable neglect" under Rule 4(a)(5). Here we disagree. We think that the court exceeded its discretion in so concluding. In our view, a lawyer's dependence entirely on a statement made under such circumstances in determining the filing deadline for a notice of appeal is not "excusable" as we have used that word in related contexts.

As already noted, we agree with the observation that, in the case of a motion for an extension of the time to file a notice of appeal, "the prejudice to the non-movant will often be negligible." *Lowry*, 211 F.3d at 463. We see no reason to doubt that that is true with respect to the prejudice to the plaintiffs in this case. We therefore agree with the starting point of the district court's analysis:

> [W]hen a party files for an extension of the time to file an appeal, "the court's sympathy will lie with the applicant: the hardship of being denied an appeal is great . . . , while the hardship to the prospective appellee is usually small." . . . [T]he prejudice to Essef of denying its motion [for an extension] would be significant, since it would be denied the opportunity to appeal a multimillion dollar verdict.

Horizon Cruises Litigation, slip op. at 5 (quoting *O.P.M. Leasing Servs., Inc.*, 769 F.2d at 916-17) (additional citation omitted).

We operate in an environment, however, in which substantial rights may be, and often are, forfeited if they are not asserted within time limits established by law. Judges, of course, make mistakes. We, like the district court, have considerable sympathy for those who, through mistakes—counsel's inadvertence or their own—lose substantial rights in that way.[8] And there is, indeed, an institutionalized but limited flexibility at the margin with respect to rights lost because they have been slept on.[9] But the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced—where every

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[8] Judge Learned Hand said of statutes of limitations:

> They are often engines of injustice; their justification lies in furnishing an easy and certain method of solving problems which are often intrinsically insoluble, or soluble only with so much uncertainty and after so much trouble that in the long run the game is not worth the candle. Perhaps they are not justifiable at all . . . . But where they do exist one must be prepared for hard cases, and it is no answer that this is one.

Helvering v. Schine Chain Theaters, 121 F.2d 948, 950 (2d Cir.1941).

[9] In addition to the shelter from the consequences of "excusable neglect" resulting in late appeals provided by Fed.R.App.P. 4(a)(5), and causing certain other procedural errors under Fed.R.Civ.P. 60(b), other obvious examples include the tolling in "extraordinary or exceptional circumstances" of the one-year period of limitations governing habeas corpus petitions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, *see, e.g., Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir.2000) (citation and internal quotation marks omitted), and the tolling of other statutes of limitations in other civil cases, *see, e.g., Pearl v. City of Long Beach*, 296 F.3d 76, 85 (2d Cir.2002) ("[W]e have broadly stated . . . that we will apply the equitable tolling doctrine as a matter of fairness where a plaintiff has been prevented *in some extraordinary way* from exercising his rights, [but] we [have] made it clear that we had in mind a situation where a plaintiff could show that it would have been *impossible* for a reasonably prudent person to learn about his or her cause of action") (citations and internal quotation marks omitted; first emphasis added; second emphasis in original), *cert. denied*, ___ U.S. ___, 123 S.Ct. 1574, 155 L.Ed.2d 313 (2003).

missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of enforcing the bar.

In our cases addressing when neglect is "excusable," we have therefore taken a hard line. In *Canfield*, for example, we affirmed the denial of a motion to extend the time for responding to an adversary's dispositive motion when the attorney filed late, in violation of "the clear dictates of a court rule," because of his personal involvement in other affairs. *Canfield*, 127 F.3d at 250. The mere "possibility that a court may properly find excusable neglect [where it consists of inadvertence, ignorance of the rules, or mistakes construing the rules does not] alter[ ] the principle that failure to follow the clear dictates of a court rule will generally not constitute such excusable neglect." *Id.* at 250.

Similarly, in *Weinstock*, we agreed that the district court did not err when it declined to grant a motion to extend the plaintiff's time to appeal, even though the untimeliness resulted from the nullification by operation of law of a previously filed notice of appeal, *Weinstock*, 16 F.3d at 502, and even though the rule under which it had been nullified had since been amended precisely because it thus "created a 'trap' for the unsuspecting litigant," *id.* at 503; *see also* Fed. R.App.P. 4 advisory committee's notes (1993 amendment) (explaining rule change).[10] We affirmed because "[t]he excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language

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[10] *See also Weinstock*, 16 F.3d at 503 (referring to *McCowan v. Sears, Roebuck & Co.*, 908 F.2d 1099, 1103 (2d Cir.), *cert. denied*, 498 U.S. 897, 111 S.Ct. 250, 112 L.Ed.2d 209 (1990), in which we observed that "Judge Posner has appropriately termed Rule 4(a) [as then in effect] a 'trap for the unwary into which many appellants, especially those not represented by counsel . . . have fallen, with dire consequences since there is no way they can reinstate their appeal if the second notice of appeal is untimely.' *Averhart v. Arrendondo*, 773 F.2d 919, 920 (7th Cir.1985).").

of the federal rules." *Weinstock*, 16 F.3d at 503 (quoting *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 515 (2d Cir.), *cert. denied*, 474 U.S. 1032, 106 S.Ct. 593, 88 L.Ed.2d 573 (1985)) (internal quotation marks omitted).

And in *Hooper II*, a criminal case nonetheless bearing a strong resemblance to the case before us, we agreed with the district court's refusal to order an extension of time to file a notice of appeal under Rule 4(b) where the failure to file a timely notice resulted from a legal assistant's confusion between the length of time after judgment in which a notice of criminal appeal must be filed and the length of time after judgment in which a civil appeal must be filed. (The appeal would have been timely had the case been civil rather than criminal.) We quoted *Weinstock*'s observation that "[a]s this Court has explained numerous times: The excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules. . . . Counsel's lack of familiarity with federal procedure is not an acceptable excuse." *Hooper II*, 43 F.3d at 29 (quoting *Weinstock,* 16 F.3d at 503 (internal quotation marks omitted in original)).

One might attempt to distinguish our decided cases from the one before us on the ground that they involved mistakes of law and this appeal is about a mistake of fact—when the thirty-day period in which to file a notice to appeal expired. *See Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 999 (11th Cir.1997) (making such a distinction). But we think that in this case, at least, it is a distinction that is difficult to sustain and of little value. In *Canfield*, for example, the defaulting lawyer had been specifically reminded of the time limitation that he ultimately missed. He simply failed to abide by it. 127 F.3d at 249. The neglect held not to be excusable therefore did not appear to result in a mistake of law. In any event, we see no reason to consider similarly neglectful conduct differently when it results in a

mistake of law rather than a mistake of fact. We find no justification for treating this case differently from *Hooper II*, for example, simply because in that case a legal assistant mistakenly thought that the rule called for a thirty rather than a ten-day limitation, whereas here, counsel knew there was a thirty-day limitation, but neglected to consult a calendar to determine when it expired. 43 F.3d at 28; *see also Lowry*, 211 F.3d at 463-64 (holding that the district court abused its discretion by concluding that one-day-late filing of notice of appeal resulting from counsel's miscalculation of the date on which notice of appeal was due was "excusable neglect" for purposes of applying Rule 4(a)(5)); *cf. Pioneer*, 507 U.S. at 392, 113 S.Ct. 1489 ("*inadvertence*, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect") (emphasis added); *Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 8 (1st Cir.2001) (affirming denial by district court of Rule 4(a)(5) extension because lateness "was the result of ignorance of the law *and inattention to detail*") (quoting the district court order under review, emphasis added). We find nothing exceptional about Hazen's comment or its context that should relieve Essef of responsibility for its own compliance with the rules of procedure. *Cf. Endicott Johnson Corp.*, 116 F.3d at 57 (absent "exceptional circumstances, each party is responsible for knowing the pertinent procedural rules and principles and for taking such steps as are needed to protect its own interests.").

To be sure, this Court does not appear to have rendered a published opinion,[11] at least after *Pioneer*, in which we have *reversed* a district court's grant of an extension of time for

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[11] Under our court rules, summary order disposition is neither precedential nor may it be cited. 2d Cir. R. § 0.23 ("Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.").

"excusable neglect" because we concluded that it *was* an abuse of discretion, as opposed to affirming a district court's denial of a motion to extend time because it *was not* an abuse of discretion. But in light of the strong language in which we have affirmed such denials in circumstances similar to this one, we have no hesitation in concluding that reversal for abuse of discretion is warranted here. Other circuits have with some frequency reversed similar district court extensions of time for excusable neglect as abuses of discretion. *See, e.g., Lowry*, 211 F.3d at 464 (reversal (by the Eighth Circuit) of a district court's Rule 4(a)(5) extension because failure to calculate correctly the thirty-day appeal period was "garden variety attorney inattention," and "[i]f we were to apply the excusable neglect standard to require that we deem [the] neglect excusable in this case, it [would be] hard to fathom the kind of neglect that we would not deem excusable"); *Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 879-80 (5th Cir.1998) (reversing Rule 4(a)(5) extension granted by district court when attorney mistakenly thought Fed. R.Civ.P. 6(e) gave him three extra days in which to file a motion for a new trial, which would have tolled the thirty-day Rule 4(a) period); *Advanced Estimating Sys.*, 130 F.3d at 998 (holding (by the Eleventh Circuit) that "as a matter of law, . . . an attorney's misunderstanding of the plain language of a rule cannot constitute excusable neglect such that a party is relieved of the consequences of failing to comply with a statutory deadline"); *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 133-34 (7th Cir.1996) (dismissing appeal where district court granted Rule 4(a)(5) extension after attorney, disregarding Fed.R.Civ.P. 6(b), filed a late motion for a new trial, which failed to toll the Rule 4(a) period, because "[a]n unaccountable lapse is not excusable neglect. . . . [T]he rule is crystal clear, the error egregious, the excuses so thin as to leave the lapse not only unexcused but inexplicable. If there was 'excusable' neglect here, we have difficulty imagining a case of inexcusable neglect."); *Kyle v. Campbell Soup Co.*, 28

F.3d 928, 931-32 (9th Cir.) (holding that district court abused its discretion by granting Rule 4(a)(5) extension, when attorney had mistakenly believed that under Fed.R.Civ.P. 6(e) the Rule 4(a) period began three days after the judgment was mailed, because the rules were "nonambiguous"), *cert. denied*, 513 U.S. 867, 115 S.Ct. 185, 130 L.Ed.2d 119 (1994). We thus think ourselves compelled, on these facts, to conclude that the district court abused its discretion when it decided that Essef's counsel's determination of the wrong date by which Essef had to file a notice of appeal in sole reliance on a remark by counsel for another party during a scheduling conference for another appeal constituted excusable neglect.

B. Confusion in the Record

Essef argues that its neglect may also be excused because it resulted from confusion in the record and dockets regarding when and whether the Second Supplemental Judgment was appealable, an issue not explicitly decided by the district court. We agree with Essef that the proceedings in this case may be characterized as at times confused: The district court's first supplemental judgments, issued in November 2001, were not mailed to some parties. All of the cases were then reopened by the court's December 7 order. And the second Rule 54(b) order was not properly entered into the bellwether docket.

But none of this was the reason for Essef's failure to file its notice of appeal on time. Essef did not assert that it was misled or confused about whether the Second Supplemental Judgment was final and the time to appeal had therefore begun to run until—during the pendency of its Rule 4(a)(5) motion for an extension—Essef's counsel, Weaver, checked the *Silivanch* docket and learned that the January 25 Rule 54(b) order had not been entered there. Essef's original Rule 4(a)(5) motion justified the tardy filing by arguing only that Essef had "never received written notice of the entry of

judgment from which [it] appealed," Essef Mot. to Reopen the Time in Which to File a Notice of Appeal dated Apr. 3, 2002, at 1—an assertion that Essef later abandoned—and that it was misled by Celebrity's lawyer, Hazen, during the telephone conference.

And Essef did indeed receive clear notice that final judgment had been entered.[12] It could not have been confused about that. Weaver spoke to the Silivanches' counsel about the appeal, and noted March 4 on his calendar as the Rule 4(a) deadline, after the February 22 telephone conference. Neither discussing the impending appeal with an adversary nor calendaring the Rule 4(a) deadline seems to us to be consistent with doubt as to whether the time to appeal had begun to run.

While there may be circumstances in which the absence of a docket entry and similar factors create legitimate and excusable confusion, they are not present here. The district court implicitly so held when it identified a single cause for the late filing: the date mentioned by counsel during the scheduling conference, not Essef's confusion by the dockets and record. That finding was not clearly erroneous.

V. Essef's Other Ground for Appeal

Essef contends that because *Silivanch* was the "bellwether" case, a timely notice of appeal in that case confers jurisdiction to hear appeals in all of the related cases. But, as we have discussed, the notice of appeal filed in *Silivanch* was not

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[12] Essef's failure to dispute that it received the Rule 54(b) order, the Rule 58 Second Supplemental Judgment (citing Rule 54(b) and stamped "THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 1/28/02,") and Jacobs' letter (whose first line read "final judgment was entered . . . on January 28, 2002"), support our conclusion that Essef did, in fact, have actual notice that the Second Supplemental Judgments were final as of January 28, 2002.

timely. We therefore do not reach the issue of whether Essef's other appeals would have been timely if the *Silivanch* appeal was.

VI. Celebrity's Cross-Appeals

Celebrity asserts that its notices of cross-appeal were timely under Fed.R.App.P. 4(a)(3), which states that when "one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed." Celebrity acknowledges that "if Essef's appeal fails" because it was not timely filed, "Celebrity's cross appeal fails with it." Ltr. from Hazen to Francis, dated Apr. 17, 2002, at 1. Because Essef's notices of appeal were not timely, Celebrity's notices of cross-appeal were not timely either. We therefore lack jurisdiction over Celebrity's cross-appeals.

CONCLUSION

For the foregoing reasons, the plaintiffs' motion is granted and the parties' appeals and the cross-appeals are dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. NEW YORK

No. 94 CIV. 5270(JCF), 94 CIV. 6147(JCF),
95 CIV. 0374(JCF).

In re: HORIZON CRUISES LITIGATION
In re: LITIGATION JOINT DISCOVERY M/V Horizon
Legionnaires Disease CELEBRITY CRUISES INC., and
FANTASIA CRUISING INC.,

Plaintiffs,

v.

ESSEF CORP., PAC-FAB, INC., AND
STRUCTURAL EUROPE, N.V. (F/N/A SFC),

Defendants.

May 15, 2002.

MEMORANDUM AND ORDER

FRANCIS, Magistrate J.

These related actions [1] were brought by passengers who contracted Legionnaire's Disease aboard a cruise ship owned and operated by Celebrity Cruises, Inc. and Fantasia Cruising, Inc. (collectively, "Celebrity"). Along with Celebrity, the plaintiffs sued Essef Corporation, Pac-Fab, Inc., and Structural Europe N.V. (collectively, "Essef"), which manufactured and distributed the filter for the whirlpool spa that was the source of the disease. The actions were consolidated for discovery, and one, *Silivanch v. Celebrity Cruises, Inc.*, was tried as a bellwether case, with findings as to liability and punitive damages to be applicable to all of the cases. Following a jury verdict holding the defendants liable and allocating fault among them, each of the individual compensatory damage claims was either tried or settled.

Judgments reflecting compensatory damages were initially entered in some of these cases, but these judgments were not immediately appealable since they did not resolve all issues, such as the allocation among the plaintiffs of the jury's punitive damage award. In November 2001 I issued a memorandum and order allocating punitive damages, together

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[1] The individual cases are: *Bentzley v. Celebrity Cruises,* 94 Civ. 1208(JCF), *Benzing v. Celebrity Cruises,* 95 Civ. 4795(JCF), *Buck v. Celebrity Cruises,* 95 Civ. 4359(JCF), *Cantone v. Celebrity Cruises,* 95 Civ. 4674(JCF), *Cesarski v. Celebrity Cruises,* 95 Civ. 4359(JCF), *DeFrancesco v. Celebrity Cruises,* 94 Civ. 6147(JCF), *Dillon v. Celebrity Cruises,* 95 Civ. 10062(JCF), *Galante v. Celebrity Cruises,* 95 Civ. 9571(JCF), *Hague v. Celebrity Cruises,* 95 Civ. 4648(JCF), *Jenkins v. Celebrity Cruises,* 95 Civ. 4000(JCF), *King v. Celebrity Cruises,* 95 Civ. 10062(JCF), *Lorenzo v. Celebrity Cruises,* 94 Civ. 9176(JCF), *Montes v. Celebrity Cruises,* 95 Civ. 1418(JCF), *Perlin v. Celebrity Cruises,* 95 Civ. 5039(JCF), *Purcell v. Celebrity Cruises,* 96 Civ. 0192(JCF), *Sckipp v. Celebrity Cruises,* 95 Civ. 4359(JCF), *Silivanch v. Celebrity Cruises,* 95 Civ. 0374(JCF), *Spaar v. Celebrity Cruises,* 95 Civ. 1957(JCF), *Stancati v. Celebrity Cruises,* 95 Civ. 9116(JCF), *Thomas v. Celebrity Cruises,* 95 Civ. 4751(JCF), *Tofano v. Celebrity Cruises,* 95 Civ. 5183(JCF), and *Viola v. Celebrity Cruises,* 95 Civ. 2726(JCF).

with supplemental judgments reflecting these awards. I also filed an order severing the claims by Celebrity against Essef and certifying the remaining issues for appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

However, the plaintiffs then moved for an award of prejudgment and postjudgment interest, and on December 7, 2001, I vacated the Rule 54(b) order and indicated that the cases should not be closed pending issuance of a further judgment. On January 23, 2002, I signed an order dealing with the interest question, and on January 25 I issued a new Rule 54(b) order along with Second Supplemental Judgments in each case. These judgments were entered by the Clerk of Court on January 28, 2002.

A number of postjudgment applications have now been filed, chief among them a motion by Essef to extend the time in which to file a notice of appeal. Since the Second Supplemental Judgments were filed on January 28, Essef's time to appeal expired on February 27, and its deadline to file a motion to extend the time to appeal pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure was March 29, 2002.

The first question is whether Essef's motion was itself timely filed and properly served. Although the motion was submitted to the Clerk of Court on March 29, it was apparently rejected because of a technical flaw.[2] That defect has been corrected, and the motion is therefore accepted as if it had actually been filed on March 29.

More significantly, the motion was served only on counsel in the *Silivanch* case, who also served as liaison counsel with

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[2] It appears that the Clerk's office should have filed the motion in any event. Pursuant to Rule 5(e) of the Federal Rules of Civil Procedure, "[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices."

respect to discovery and other matters. Counsel in the other individual cases only learned of the motion when they received my order establishing a briefing schedule. Each individual case was concluded with entry of a separate judgment, so there is little doubt that all counsel should have been served. However, improper service may be excused where there is actual notice together with exceptional good cause. *See Sally v. Board of Governors, University of North Carolina,* 136 F.R.D. 417, 420 (M.D.N.C.1991). That standard is met here. Counsel in all of the cases were on notice of Essef's motion when they received my scheduling order, and some chose to respond to the motion. Good cause exists because the prejudice to Essef if the motion were rejected is extraordinary: it would be deprived of the opportunity to appeal in any case except *Silivanch.* By contrast, the plaintiffs would not be prejudiced because they did, in fact, have the opportunity to contest the motion.

On the merits, it is appropriate to grant Essef's motion. Under Appellate Rule 4(a)(5)(A)(ii), the time to appeal may be extended if the moving party "shows excusable neglect or good cause." Here, counsel for Essef engaged in a telephone conference with staff counsel for the Second Circuit Court of Appeals on February 19, 2002, to discuss appeals filed by certain of the plaintiffs on the basis of the earlier judgments. (Declaration of Robin G. Weaver ("Weaver Decl."), attached as Exh. A to Essef Memorandum of Law, ¶ 19). During that conference, counsel for Celebrity stated that the deadline for appealing from the Second Supplemental Judgments was March 4, 2002. (Weaver Decl., ¶ 19; Declaration of James M. Hazen dated March 29, 2002, attached as Exh. B to Essef Memorandum of Law, ¶ 3). In reliance on that erroneous calculation, Essef did not file its notice of appeal until March 1, which was beyond the deadline. (Weaver Decl., ¶ 20). Excusable neglect may "encompass situations in which failure to comply with a filing deadline is attributable to negligence." *Pioneer Investment Services Co. v. Brunswick*

Associates L.P., 507 U.S. 380, 394 (1993) (discussing Fed.R.Civ.P. 60(b)). This is such a case.

Furthermore, when a party files for an extension of the time to file an appeal, "the court's sympathy will lie with the applicant: the hardship of being denied an appeal is great . . . , while the hardship to the prospective appellee is usually small." *O.P.M. Leasing Services, Inc. v. Far West Savings and Loan Association,* 769 F.2d 911, 916-17 (2d Cir.1985); *see also Bordeaux v. Lynch,* No. 95-CV-1761, 1997 WL 205289, at *1 (N.D.N.Y. April 23, 1997). As noted above, the prejudice to Essef of denying its motion would be significant, since it would be denied the opportunity to appeal a multimillion dollar verdict. The plaintiffs argue that further delay will be prejudicial to them because some may not live to see the end of this already lengthy litigation. But that prejudice is inherent in the appeal process and would exist even if Essef had filed a timely appeal. Thus, the balance of hardships tips in favor of Essef, and its motion is therefore granted.[3]

Two subsidiary issues remain. First, the *Silivanch* plaintiffs have moved pursuant to 28 U.S.C. § 1927 to sanction Essef for its motion. Although some of Essef's arguments were unfounded, it has ultimately prevailed on the motion. Accordingly, sanctions are not warranted.

Second, Essef has sought a stay of enforcement of the judgments pending appeal. That application is granted provided that Essef post a bond for the full amount of any judgment that it appeals from. To the extent that Essef does

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[3] Essef argued in what are effectively its reply papers that *no* appealable judgment has been entered even yet and that the Court should now direct the Clerk of Court to do so. This is an after-the-fact rationalization that is inconsistent with the record and with the contemporaneous understanding of all parties. Essef's application for a further order to the Clerk of Court is therefore denied.

not appeal from some portion of any judgment, it need not post a bond for the unappealed award, but, of course, the plaintiffs may execute on that segment of the judgment not appealed from.

Conclusion

For the reasons set forth above, Essef's motion to extend the time to file an appeal in each of the *Horizon* actions is granted and any notice of appeal shall be filed within ten days of today's date. Essef's application to direct the Clerk of Court to enter further judgments is denied. The *Silivanch* plaintiffs' motion for sanctions is denied. Finally, Essef's motion for a stay of execution of the judgments pending appeal is granted on the conditions set forth above.[4]

SO ORDERED.

[4] This Memorandum and Order shall be docketed in each of the individual cases identified in footnote 1 above.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall United States Court House
40 Foley Square
New York 10007

[Filed Aug. 28, 2003]

Dkt. No. 02-7595(L)
02-7229(L)
02-7611(L)
02-7615(L)

FREEMAN, BUCK, DEFRANCESCO,
Plaintiffs,

v.

CELEBRITY CRUISES, *et al.*,
Defendants-Cross-Appellants.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of August two thousand three.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Defendants-Appellants-Cross-Appellants Essef Corp., et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/ Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney

APPENDIX D

Fed. R. App. P. 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * *

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

* * * *

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7111, 102 Stat. 4419; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

Fed. R. App. P. 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases.

* * * *

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

* * * *

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7111, 102 Stat. 4419.)

Supreme Court, U.S.
FILED
NOV 17 2003
OFFICE OF THE CLERK

No. 03-573

IN THE

SUPREME COURT OF THE UNITED STATES

ESSEF CORPORATION, PAC-FAB, INC., AND STRUCTURAL EUROPE, N.V.,

Petitioners,

v.

JOHN AND JOYCE SILIVANCH, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN J. HESSION*
JAMES E. RYAN
BRENDAN M. BURKE, JR.

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November 14, 2003

*Counsel of Record

QUESTIONS PRESENTED

WHETHER PETITIONERS' CLAIMS OF ERROR IN THE APPLICATION OF *PIONEER INVESTMENT SERVICES CO. V. BRUNSWICK ASSOCIATES, LTD. PARTNERSHIP*, 507 U.S. 380 (1993) WARRANTS REVERSAL OF THE SECOND CIRCUIT'S FINDING THAT AN ATTORNEY'S FAILURE TO COMPLY WITH A CLEAR AND UNAMBIGUOUS JURISDICTIONAL RULE WOULD NOT BE EXCUSED?

LIST OF PARTIES

In addition to the parties listed in the caption, the following are also parties:

Felice and Frances DeFrancesco, Raymond and Mary Hague, Carol and Richard Lorenzo, Dorothy Cantone, Kevin L. Jenkins, William, Kathleen, William Jr., and Kimberly Buck, Ronald and Sima Cesarski, Michael and Doris Sckipp, Fran and Rita Galante, Mary and Louis B. Montes, Jane King, Clare Dillon, and Mary Purcell, Plaintiffs-Appellees, Celebrity Cruises, Inc., and Fantasia Cruising, Inc.

Because these cases are not consolidated, motions to dismiss below were made in the following twenty-five (25) appeals:

02-7229 (Lead), 02-7279, 02-7320, 02-7595, 02-7600, 02-7603, 02-7604, 02-7606, 02-7607, 02-7608, 02-7609, 02-7610, 02-7611, 02-7612, 02-7613, 02-7615, 02-7617, 02-7619, 02-7643, 02-7667, 02-7669, 02-7670, 02-7671, 02-9145, and 02-9207.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Raymond and Mary Ruth Hague ("Hague"), Felice and Frances DeFrancesco ("DeFrancesco"), and Carol and Richard Lorenzo ("Lorenzo"), respectfully request that this Court deny the instant petition for a writ of certiorari since the lower court carefully considered and balanced the *Pioneer* factors all concluded, correctly that Petitioners' failure to timely file the notice of appeal in these cases did not constitute excusable neglect. The lower court's decision was in conformity with the dictates of this Court's ruling in *Pioneer* and in uniformity with sister circuits, and therefore, the petition should be denied.

OPINIONS BELOW

The opinion of the court of appeals is published at 333 F.3d 355 (2nd Cir. 2003) and appears in the Appendix of Petitioner's Petition ("Pet. App.") at 1a-27a. The court of appeal's unpublished order denying the petition for rehearing *en banc* appears at Pet. App. 34a-35a. The unpublished order of the district court is available at 2002 WL 1000949 (S.D.N.Y. 2002) and appears at Pet. App. 28a-33a.

JURISDICTION

The court of appeals granted Respondents' motion to dismiss for lack of appellate jurisdiction on June 25, 2003, and later denied a petition for rehearing *en banc* on August 28, 2003. Shortly thereafter, the court of appeals granted, in part, Petitioners' motion to stay the issuance of the mandate on September 24, 2003. As urged by these Respondents, the stay was conditioned upon Petitioners' timely filing of the instant petition on or before October 14, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the lower court's judgment dismissing Petitioners' appeals.

PROVISIONS INVOLVED

Federal Rules of Appellate Procedure, Rule 4(a)(1)(A) and 4(a)(5)(A), reproduced at Pet. App. 36a-37a.

STATEMENT OF THE CASE

This matter encompasses twenty-two individual cases brought by passengers who fell ill as a result of a 1994 outbreak of Legionnaires' Disease aboard the cruise ship M.V. "HORIZON." After withdrawing from a class action lawsuit early in this litigation, the Respondents stipulated that a single case, *John and Joyce Silivanch v. Celebrity Cruises, Inc., et al.,* would be tried as a 'bellwether' case. *See*, Declaration of John J. Hession In Support of Motion to Dismiss Dated 07/12/02 ¶¶ 9-10, Exhibit 1 (hereinafter "Hession Dec.").[1] The bellwether case determined: (a) the liability of both the Petitioners and the other co-defendants below, Celebrity Cruises, Inc. and Fantasia Cruising, Inc.; (b) the percentage of responsibility among the defendants below, and; (c) an assessment of punitive damages, if any, against the Petitioners. *See*, Hession Dec., Exhibits 1, 2. The bellwether jury found the defendants below liable and further found Petitioners liable for punitive damages based on fraudulent acts. Thereafter, the twenty-one remaining plaintiffs entered into settlement discussions with the defendants or brought their cases to trial on the issue of damages. *See*, Hession Dec., Exhibit 2, at 2-3.

As from the bellwether case, all the other cases settled with the exception of the *Hague* and *DeFrancesco* Respondents. *See*, Hession Dec. ¶ 11. Both the *Hague* and

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[1] The Declaration of John J. Hession In Support of the Motion to Dismiss Dated 7/12/02 is a part of the record below. Sup. Ct. R. 12(7). The declaration refers to exhibits, which served as a *de facto* appendix. We refer herein to both the pertinent declaration paragraphs and the exhibits to which they refer.

DeFrancesco cases were tried before juries, and both juries awarded compensatory damages to these Respondents. These verdicts also entitled the Respondents *Hague* and *DeFrancesco* to a *pro rata* share in the bellwether jury's punitive damages award.

On November 7, 2001, the trial court rendered an Order setting forth the *pro rata* distribution of the punitive damage award among eligible plaintiffs. *See*, Hession Dec. ¶¶ 9, 16. Pursuant to the November 7, 2001 Order, separate Supplemental Judgments were entered in each of the eligible cases reflecting the amount of punitive damages distributed in each case. *See*, Hession Dec. ¶ 16, Exhibits 10, 11. Upon entry of the Supplemental Judgments, all issues were resolved and no other motions or issues were pending before the Court in any Plaintiffs' cases, including *Silivanch*. *See*, Hession Dec. ¶ 18. On November 19, 2001, at the request of counsel for *Silivanch*, the Court issued a Fed. R. Civ. P. 54(b) Order.

Thereafter, on December 7, 2001 at 9:34 in the forenoon, these Respondents exercised their right to Appeal. *See*, Hession Dec.¶ 20, Exhibits 13, 14, 15. In the afternoon of December 7, 2001, which was arguably the final day to file a notice of appeal from the November 7, 2001 Supplemental Judgments, the chambers of the trial court below circulated by facsimile an Order purporting to re-open and stay the finality of almost all the bellwether cases. *See*, Hession Dec. ¶ 22, Exhibit 16.

On January 23, 2002, the trial Court issued a Memorandum and Order addressing certain facets of the December 7, 2001 Order. *See*, Hession Dec. ¶ 24, Exhibit 17. The trial court clarified that the statutory interest rate had changed with the abolishment of the 52 Week Treasury bill. *See*, Hession Dec. ¶ 24, Exhibit 17. On January 28, 2002, individual "Second Supplemental Judgments," which were substantially the same as the November Supplemental

Judgments in the *Hague* and *DeFrancesco* cases, were entered on the docket. *See*, Hession Dec. ¶ 26, Exhibits 21, 22.

Being of the belief that finality was reached in their cases on November 7, 2001, and having filed notices of appeal on December 7, 2001, counsel for these Respondents was then contacted by Staff Counsel's office of the United States Court of Appeals for the Second Circuit in order to set forth a scheduling order for the *Lorenzo* appeal. As the *Lorenzo* Respondents had been denied a portion of the punitive damages by the trial court's November 7, 2001 Order and "Second Supplemental" Judgment, a Notice of Appeal therefore was filed on December 7, 2003. *See*, Hession Dec. Exhibit 30. A teleconference to discuss the *Lorenzo* appeal, was held on February 22, 2002 with Mr. Frank Scardelli, Esq. of the Staff Counsel's office, Mr. Robin Weaver, Esq., counsel for the Petitioners herein, Essef Corporation, Pac-Fab, Inc., and Structural Europe, N.V., Mr. James Hazen, Esq., counsel for Celebrity Cruises, Inc. and Fantasia Cruising, Inc., Mr. Brendan M. Burke, Esq., counsel for Respondents, Raymond and Mary Ruth Hague, Felice and Frances DeFrancesco, and Carol and Richard Lorenzo. *See*, Hession Dec. Exhibit 30.

During the conversation Staff Counsel attempted to set forth a stringent briefing schedule. Mr. Scardelli proposed a date in early March for submission of the Record on Appeal and the Briefs on Appeal. *See*, Hession Dec. Exhibit 30. Counsel for these Respondents, Mr. Burke, objected to the early date and explained to Mr. Scardelli that additional appeals might be filed as Second Supplemental Judgments had been entered on the docket in the district court on January 28, 2002 *See*, Hession Dec. Exhibit 30.

Mr. Burke further explained to Mr. Scardelli that other parties were expected to file notices of appeal from the

Second Supplemental Judgments. *See*, Hession Dec. Exhibit 30. Because of a rather extensive record, Mr. Burke indicated that it was preferable for the court to delay the briefing schedule in the *Lorenzo* appeal so that it could be ascertained whether or not any other parties would be filing a Notice of Appeal from the January 28, 2000 judgments. *See*, Hession Dec. Exhibit 30. The postponement of entering a scheduling order in *Lorenzo* was requested for the sake of judicial and real economy, so that one joint appendix could be compiled for use in any related appeals. *See*, Hession Dec. Exhibit 30.

When pointedly asked by Staff Counsel whether they intended to appeal, both Mr. Weaver and Mr. Hazen *refused* to disclose their clients' intentions regarding the filing of any future notices of appeal. *See*, Hession Dec. Exhibit 30. In the context of scheduling a future scheduling conference date, when asked by Staff Counsel, Mr. Hazen suggested that March 4, 2002 was the deadline to file appeals from the Second Supplement Judgments. *See*, Hession Dec. Exhibit 30.

Because the Second Supplemental Judgments were entered on the district court's docket on January 28, 2002, Petitioners in reality only had until February 27, 2002 to file notices of appeal from those judgments. As the record reflects, the Petitioners did not file their notice of appeal until March 1, 2002. When the Petitioners did file their Notice of Appeal, they only filed an appeal of the *Silivanch* Second Supplemental Judgment. Upon realizing that the March 1, 2002 notice of appeal was untimely filed, Petitioners then filed a motion which the trial court deemed filed on March 29, 2003, requesting, *inter alia*, an extension of time to file their appeals pursuant to Fed. R. App. P., Rule 4(a)(5). Following a hearing, the motion was granted on May 15, 2002. Petitioners and their co-defendants below filed these several appeals in June of 2003. In July of 2003, these Respondents, as well as other Respondents, filed motions to dismiss for lack of appellate jurisdiction. That motion was

granted on June 25, 2003. A motion for rehearing *en banc* was made and, thereafter, denied on September 24, 2003. The instant petition was filed on October 17, 2003.

REASONS FOR DENYING THE PETITION

The facts of the instant matter are neither novel nor representative of any split among the circuits in the application of the *Pioneer Investment Services Co. v. Brunswick Associates Ltd Partnership*, 507 U.S. 380 (1993) "excusable neglect" test. Rather, this case is simply one of garden-variety attorney neglect based on inexcusable mistake, namely, Petitioner's failure to consult a calendar to calculate the Fed. R. App. P., Rule 4(a)(1)(A) thirty-day deadline for filing a notice of appeal. This resulted in Petitioners' misapplication of a clear and unambiguous procedural rule which is inexcusable under *Pioneer*.

The opinion of the court below thoroughly discussed and properly applied all four 'excusable neglect' considerations as announced in this Court's *Pioneer* opinion. The Petitioners' argument seriously misconstrues the decision of the Second Circuit by stating that the lower court only considered one of the *Pioneer* factors, 'the reason for delay.' This is entirely inaccurate.

Moreover, there is no split in authority as alleged by Petitioners. The wisdom of the *Pioneer* test is that it is quite flexible and certain factors of the test will favor certain parties depending of the type and context of the case to which it is applied. Petitioners argue that this results in a split among the circuits, but there is no such conflict in circuit authority. Rather, the alleged 'split' is simply the result of case-by-case analysis by the several circuits to vastly different facts under consideration.

Incongruously, Petitioners argue for "uniformity" in the application of *Pioneer*, while the very essence of *Pioneer* is that there no longer is any 'hard line' uniformity for determining what constitutes 'excusable neglect.' *Pioneer* represents flexibility, leaving the determination of 'excusable neglect' to the discretion of the lower courts in deciding whether a particular omission or commission is sufficient for a finding of 'excusable neglect.' Just as each case is different, so too is the balancing of the *Pioneer* factors. In some cases certain factors will have little balancing value, in others, the same factors will 'tip the scales', so to speak. *Pioneer* requires an equitable and flexible determination of 'excusable neglect' to be made by lower courts, as was done in this matter.

STANDARD OF REVIEW ON WRIT OF CERTIORARI

Supreme Court Rule 10 which lists the reasons the Court will consider in deciding whether to grant a petition for writ of certiorari states the following:

Rule 10. Considerations Governing Review on Certiorari

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual

course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Although the Petitioners herein have not stated under which of these provisions their petition should be considered, it can only be based on the provision for review under 10(a) where a court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. As more fully discussed below, Petitioners misinterpret the decisions of courts of appeals which have applied this Court's rule in the *Pioneer Ins Services Co. v. Brunswick Associates*, 113 S. Ct. 1489, 123 L.Ed. 2d 74, to argue that a split among the circuits has occurred. No such conflict exists.

Furthermore, Petitioners argument that the Second Circuit Court of Appeals decision in *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355 (2d Cir. 2003) "restructures" the excusable neglect test this Court established in *Pioneer* asserts, at best, a misapplication of a properly stated rule of law by the circuit

court in that case. Accordingly, this Court should decline to review the decision below.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS ON THE MATTER OF 'EXCUSABLE NEGLECT:.

Petitioners have misconstrued the various decisions by the Circuit Courts in applying the *Pioneer* factors as resulting in a conflict among the Circuits on the matter of finding 'excusable neglect.' The fact is that *Pioneer resolved* the conflict among the circuit courts as to what must be shown before a finding of excusable neglect can be made under F.R.A.P.4 (a)(5) and other federal statutes. As a result, the Circuit Courts now apply a uniform test, the one established by this Court in *Pioneer*, which involves a consideration of four well known factors. Naturally, one or more of those factors determines the outcome of each particular case, depending on the circumstances presented by the case under consideration. Necessarily, because there is no "bright line" standard, the same *Pioneer* factor, or combination of factors, is not given the greater weight by any circuit in all cases. This approach clearly adheres to the *Pioneer* principle. It does not nearly approach a conflict among the Circuits regarding how "excusable neglect" is measured.

As is well known, prior to this Court's decision in *Pioneer Ins. Services Co. v. Brunswick Associates*, 113 S.Ct. 1489, 123 L.Ed 2d 74 (1993), some circuit courts, including the Second Circuit, required that in order to be excused, the reason for a delay in filing outside a clearly stated filing date could only have resulted from unique or extraordinary circumstances which were beyond the control of the party seeking to be excused. *See, e.g., Pontarelli v. Stone,* 930 F.2d 105 (1st Cir. 1991); *Rivera v. Puerto Rico Tel. Co.,* 921 F.2d 393 (1st Cir. 1990); *650 Park Ave Corp. v. McRae*, 836 F.2d

764 (2nd Cir.1988); *Airline Pilots Inc. v. Executive Airlines, Inc.*, 569 F.2d 1174 (1st Cir. 1978).

Other circuit courts adopted a far more liberal policy to excuse late filing which were the result of the culpable negligence of a party or its attorneys. Those courts considered such factors as the length of delay in filing, the prejudice or lack of prejudice caused to the other parties, whether there was evidence of bad faith by the moving party, the effect on judicial administration and others. *See, e.g., Lorenzen v. Employees Retirement Plan of Sperry Hutchinson Co*, 896 F.2d 228 (7th Cir. 1990); *In re Centric Corp*, 901 F.2d 1514 (10th Cir. 1990) *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3rd Cir. 1987).

The *Pioneer* decision resolved that conflict by holding that a more flexible rule should be employed in order to determine whether a party's late filing was due to excusable neglect. *Pioneer* 113 S.Ct. at 1491. The *Pioneer* majority established the well known four factors that courts should consider in deciding whether a delay was excusable.[2] These are: whether the movant acted in good faith; the existence of prejudice to the non-movant should late filing be permitted; the effect of the late filing on judicial economy; and finally, the reason for the delay in filing. *Pioneer* Id. 113 S.Ct. at 1498.

After the *Pioneer* decision was announced, the previously existing division among the circuit courts on the issue of "excusable neglect" was resolved, and the courts now

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[2]The *Pioneer* decision construed the "excusable neglect" exception allowed for late filings in bankruptcy proceedings under Bankruptcy Rule 9006(b)(1). The same four part test which was established by the *Pioneer* court was subsequently extended to the "excusable neglect" exception provided by F.R.A.P. 4 by the Court in *Stutson v. U.S.*, 116 S.Ct. 600, 133 L.Ed. 571 (1996).

universally apply the four-part test, which the *Pioneer* majority established.[3] *Graphic Communications, Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, (1st Cir. 2001)("We have recognized that *Pioneer* marked a shift in the understanding of excusable neglect"). All the circuit courts, including the Second Circuit, came to the same conclusion. See, e.g., *Robb v. Norfolk & W. Ry. Co.*, 122 F. 3d 354, 359 (7th Cir. 1997) ("*Pioneer* broadened the definition of 'excusable neglect'"); *United States v. Thompson,* 82 F. 3d 100, 702 (6th Cir. 1996) (*Pioneer* establishes "a more liberal definition of what constitutes excusable neglect when an individual seeks a motion for an extension of time in the district court under Fed. R. App. P. 4"); *Pink v. Union Cent. Life Ins. Co.*, 65 F.3d 722, 724 (8th Cir. 1995) (*Pioneer* "established a more flexible analysis of the excusable neglect standard"); *United States v. Hooper*, 9 F.3d 257, 258 (2nd Cir. 1993) (*Pioneer* advances "a more lenient interpretation" of excusable neglect).

As would be expected, the various circuit courts in considering the four *Pioneer* factors have necessarily given different weight to these factors depending on the individual circumstances of the particular case under review. This approach is in keeping with the *Pioneer* rule, and clearly does not comprise a conflict among the circuits requiring Supreme Court intervention.

For example, in the case under consideration, *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355 (2nd Cir. 2003), the

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[3] The *Pioneer* court noted that the policy to permit courts to accept late filing not only caused by circumstances beyond a party's control under BR 9006(b)(1), was in accord with the underlying policies of the Chapter 11 bankruptcy statute and the bankruptcy rules which entrust the courts with broad equitable powers in order to ensure the success of a debtor's reorganizations. (113 S.Ct. at 1491 *supra*). It is submitted that there are obviously no such policy considerations involved in the Petitioners' case here.

panel recognized that prior to the Supreme Court's decision in *Pioneer*, the Second Circuit adhered to the more stringent rule that the excusable neglect standard could never be met by a showing of inability or refusal to comprehend the plain language of the federal rules. *Silivanch,* 33 F.3d at 365. The court acknowledges that this is no longer the rule, and specifically recognized that inadvertence, ignorance of the rules, or mistakes in construing the rules, may now be excused in some circumstances. However, it also recognized that "the equities will rarely if ever favor a party who fail[s] to follow the clear dictates of a court rule…and where the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test." *Silivanch*, Id at 366-67.

The *Silivanch* panel clearly recognized that in *Pioneer*, this Court had established a more liberal standard for determining whether there had been excusable neglect, and referred to a number of their earlier decisions in which *Pioneer's* "more liberal" definition of excusable neglect was applied. *Silivanch*, 33 F.3d at 366, *citing*, *Canfield v. Van Atta_Buick/GMC Truck, Inc.*, 127 F.3d 248, 249-50 (2nd Cir. 1997) (*per curiam*), *cert. den.*, 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed.2d 117 (1998); *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994), *cert denied*, 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed. 2d 117 (1998); *United States v. Hooper*, 9 F. 3d 257, 259 (2d Cir. 1993) (applying *Pioneer* to extensions of time to file notices of appeal under F.R.A.P. 4(b), and noting that "nothing…limits its interpretation…to the Bankruptcy Rules").

Noting that this Court referred to excusable neglect as an "elastic concept," the Second Circuit in *Silivanch* explained that in applying the *Pioneer* factors to the typical Fed. R. App. P. Rule 4(a)(5) case, the first two factors will always favor the moving party:

> [D]elay always will be minimal in actual if not relative terms, and the prejudice to the non-movant, will often be negligible, since the Rule requires a 4(a)(5) motion to be filed within thirty days of the last day for filing a timely notice of appeal." *Lowry v. McDonnell Douglas Corp.* 211 F.3d 457, 463 (8th Cir.), *cert denied*, 531 U.S. 929, 121 S.Ct. 309, 148 L.Ed.2d 248 (2000). And rarely in the decided cases is the absence of good faith at issue. *See*, *Id.* But despite the flexibility of "excusable neglect" and the existence of the four-factor test in which three of the factors usually weigh in favor of the party seeking the extension, we and other circuits have focused on the third factor: "the reason for the delay, including whether it was within the reasonable control of the movant." *Pioneer*, 507 U.S. at 395, 113 S.Ct. 1489. We have noted that the equities will rarely if ever favor a party who "fail[s] to follow the clear dictates of a court rule" and held that where "the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test." *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 250-51 (holding not clearly erroneous the district court's decision that a lawyer's failure to file motion papers within the time limit established by a local rule was not excusable neglect under Rule 60(b)); *United States v. Hooper*, 43 F.3d 26, 28-29 (2d Cir. 1994) (per curiam) ("*Hooper II*") (affirming denial of Rule 4(b) extension where delay resulted from legal assistant's ignorance of rules).

Silivanch, at 366, 367.

The *Silivanch* Court referred to the *Graphic Communications* decision, where the United States Court of Appeals for the First Circuit observed:

> Although the *Pioneer* standard is more forgiving than the standard in our prior case law, there still must be a satisfactory explanation for the late filing… [T]he four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry.

Silivanch, at 367, *citing*, *Graphic Communications*, , 270 F.3d 1, 5 (1st Cir. 2001)

Certainly the courts' holdings in *Silivanch* and in *Graphic Communications* fully comport with the Supreme Court's confirming that "inadvertence, ignorance of the rules, or mistakes construing the rules *do not usually* constitute 'excusable' neglect," *Pioneer*, 507 U.S. at 392, 113 S.Ct. 1489 *(emphasis added)*.

That other circuit courts in other specific cases find one or more other of the four *Pioneer* factors controlling, clearly does not establish the type of multiple and mature splits among the circuits which the Petitioners argue warrant granting certiorari in this case. It is submitted that a faithful application of the Pioneer rule by the circuit courts will *necessarily* result in different factors controlling in different cases.

For example, the Court of Appeals for the Eleventh Circuit in the case of *In re Worldwide Web Systems, Inc.*, 326 F.3d 1291 (11th Cir. 2003), considered whether to vacate under Fed. R. Civ. P. Rule 60(b)(1) the default judgment of an individual who failed to answer the trustee's complaint alleging a preferential transfer of funds. The panel declined to set the default aside, noting that to establish excusable neglect under Fed. R. Civ. P. Rule 60 (b)(1), the defaulting party must show that it had a meritorious defense to the

complaint, which might have affected the outcome, *in addition to* the court's consideration of the *Pioneer* factors. Since the circuit court found that the movant "has not offered anything resembling a meritorious defense..." and had "inexplicably failed to appear at a hearing set by the court to address his claim that the $1.8 million default judgment should be set aside..." the default judgment would not be set aside, *In re Worldwide Web Systems* at 1296. The court further noted that "while the absence of prejudice to the non-moving party and to the interest of efficient judicial administration are of 'primary importance'," the *Pioneer* decision does not alter the fact that a determination of excusable neglect is an equitable one that necessarily involves consideration of all the relevant circumstances, including the existence of a meritorious defense, lack of prejudice and "a good reason for not responding to the complaint – and not, as *Valdez* argues, exclusively prejudice." *Id.* at 1298. This is precisely the Court's holding in *Pioneer*. *See, Pioneer*, 507 U.S. at 395, 113 S.Ct. at 1498. Indeed, it is also the rule followed by the Second Circuit Court of Appeals in *Silivanch*, (*See,* 333 F.3d at 366).

Likewise, in the case of *In re Eagle Bus Mfg., Inc.,* 62 F.3d 730 (5th Cir. 1995), another bankruptcy proceeding, the court noted that since there would be no prejudice to the debtor by allowing late filing of creditor's proofs of claim, there would be no substantial delay so as to adversely effect the administration of the case and there was *a good reason* provided for the delay in filing, the court would allow the claimants to file untimely proofs of claim "based on the specific facts of this case" *In re Eagle Bus*, 62 F.3d at 739, 740.

Additionally, although the District of Columbia Court of Appeals in *Yesudian ex rel. U.S. v. Howard University*, 270 F.3d 969 (D.C. Cir. 2001), found there was no abuse of discretion by the District Court in its "case management

decision" to allow the late pleading of a defense, even though the District Court made no specific finding of excusable neglect, the panel conducted the *Pioneer* analysis, and concluded that each factor favored the moving party. Consequently, the court of appeals would not reverse the district court's decision to allow the late pleading. *Yesudian* at 971.

Later, in the case of *In re Vitamins Antitrust Class Actions*, 327 F. 3d 1207, (D.C. Cir. 2003), the District of Columbia Circuit Court granted a party's untimely application to opt-out of a class action settlement for excusable neglect, even though the delay was caused by "factors within the party's reasonable control." The court noted that the district court found that the other three *Pioneer* factors outweighed the reason for the delay factor, and affirmed the district court's case management decision to permit the party to opt-out. In doing so, the panel distinguished those cases such as *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457 (8th Cir. 2000) and *Advanced Estimating Systems Inc. v. Riney*, 130 F. 3d 996 (11th Cir. 1997), which involved an attorney's failure to file a timely notice of appeal, which was not excused, due to counsel's misapplication of clear and unambiguous procedural rules. Those cases, the panel noted, involved an attorney's failure to file a notice of appeal, just as in the present case. The court noted that failure to file a timely notice of appeal was an issue of special interest to the courts of appeal, *citing, Lowry*, 211 F.3d at 458, and was readily distinguishable from a case management decision by the district court in a complex class action, such as occurred in the *In re Vitamins Action* case.

The *Silivanch* case also involves counsel's misapplication of a clear and unambiguous procedural rule and not a case management decision by the district court in complex litigation.

In the *In re Orthopedic Bone Screw Products Liability* case, 246 F. 3d 315 (3rd Cir. 2001), also a class action suit, the Third Circuit Court of Appeals found all four Pioneer factors to exist. Under the circumstances of that case, it found excusable neglect, and consequently it reversed the district court's decision excluding a claimant from sharing in a class action settlement fund simply because he failed to meet the registration deadline.

In the context of criminal proceedings, this Court has noted that the "liberal understanding of 'excusable neglect' announced in *Pioneer* is especially applicable in criminal appeals under F.R.A.P. 4(b), *Stutson v. U.S.*, 116 S.Ct. 600, 602, 133 L.Ed 2d 571, 573 (1996). Following that guidance, the Court of Appeals for the Sixth Circuit in *U.S. v. Thompson*, 82 F.3d 700 (6th Cir. 1996) simply remanded a prisoner's motion for permission to file a notice of appeal of his conviction pursuant to F.R.A.P. 4(b), so the district court could evaluate the "motion under the expanded definition of excusable neglect..." under *Pioneer* and *Stutson*. *U.S. v. Thompson* 82 F.3d at 702, 703. Although the court stated in *Thompson* that when requesting an extension of time a party must first show excusable neglect, and if found to exist, the court must then examine the issues of prejudice to the non-movant and judicial administration, *Thompson* at 702. Reading the entire decision, it is clear that the Sixth Circuit Court recognized that *Pioneer's* expanded four part test of excusable neglect was controlling. That being so, it is clear that the courts in the Sixth Circuit will also look to the four *Pioneer* factors and apply them, as appropriate, in the exercise of their discretion, as do the courts of all the other circuits.

U.S. v. Brown, 133 F. 3d 993 (7th Cir.1998) was another criminal case where the Seventh Circuit Court of Appeals simply declined to overturn the district court's decision to permit late filing of a notice of appeal under F.R.A.P. 4(b),

"in a close case," where all four *Pioneer* factors were considered and weighed by the district court, *Brown* at 997. This decision also illustrates that the circuit courts universally look to the *Pioneer* rule when determining whether excusable neglect exits. It is therefore natural to expect that, on the facts of each particular case, one or more factors will weigh more heavily over the others, in keeping with this Court's guidance in *Pioneer*.

The same can be said with respect to the decision of the Eleventh Circuit Court of Appeals in *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996). Although Petitioners contend that this case provides another example of a split among the circuits, the *Cheney* court merely found that when all four *Pioneer* factors were weighed, the equities required a finding that failure to file a demand for trial *de novo* within 30 days after issuance of an arbitration award was due to excusable neglect. Since the court of appeals found that the district court failed to apply the *Pioneer* standard to the circumstances of the *Cheney* motion, the panel found this to be an abuse of the district court's discretion, and reversed. Although the *Cheney* court commented that this Court, in *Pioneer,* accorded primary importance to the absence of prejudice to the non-movant and to the interest of efficient judicial administration in the *bankruptcy context presented by Pioneer*, it is clear that there is nothing in the *Pioneer* decision which requires the courts to give greater weight to any one or more of the factors discussed, nor do the circuit courts which apply *Pioneer* consider that to be required. Rather, the decisions since *Pioneer* reflect a balancing of the four factors in an equitable way, considering all the circumstances presented by each case, to reach a determination whether, in the exercise of its discretion, a court will excuse the failure to act in a timely fashion. That different courts have considered different factors to be more important under the circumstances of individual cases fully comports with this Court's directive in *Pioneer*.

Furthermore, that the Second Circuit in *Silivanch*, the Eight Circuit in *Lowry*, 211 F. 3d at 464, the Fifth Circuit in *Midwest Employers Case*., 161 F. 3d 877, 879-880 (5th Cir. 1998), the Eleventh Circuit in *Advance Estimating Systems, Inc.*, 130 F. 3d 996, 998 (11th Cir. 1997), the Seventh Circuit in *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132,133-134 (7th Cir 1996); and the Ninth Circuit in *Kyle v. Campbell Soup Co.*, 28 F. 3d 928 (9th Cir. 1994), do not excuse an attorney's inexplicable lapses in failing to meet a filing date, and does not create a conflict among the circuits so as to require further guidance from this Court about excusable neglect. These rulings clearly comport with this Court's recognition that "inadvertence, ignorance of the rules, or mistakes construing the rules *do not usually constitute `excusable neglect`*..." *Pioneer*, 113 S.Ct. at 1496 *(emphasis added)*. Indeed, if the type of neglect which Petitioners seek to have excused here is accepted, as other circuit courts have observed, it would be hard to fathom a case where *inexcusable neglect* exists. *Lowry*, 211 F.3d at 364; *Prizevoits v. Indiana Bell Tel. Co.*, 76 F. 3d at 133-34 *(emphasis added)*.

The Second Circuit had it exactly right when it noted that in applying the *Pioneer* factors, the equities will rarely, if ever, favor a party who fails to follow the clear dictates of a court rule, and held that where "the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test." *Silivanch*, 333 F.3d at 366-67; *Canfield*, 127 F.3d at 250-51.

II. THE WELL REASONED OPINION BELOW REFLECTS THE CORRECT APPLICATION OF THE *PIONEER* EXCUSABLE NEGLECT FACTORS.

A. The Second Circuit Considered, And Balanced The *Pioneer* Factors Properly, Finding Petitioners' Negligence Was Inexcusable.

The Second Circuit did not merely recite the *Pioneer* factors and find only one dispositive. Even a brief perusal of the Second Circuit's thoroughly reasoned decision discloses that the lower court did, in fact, consider *all* four *Pioneer* factors before concluding that one factor, the reason for delay, *outweighed* all other factors.[4]

The *Silivanch* court then discussed each of the factors. Beginning with the first two factors, the Court noted that, "[d]elay will always be minimal in actual if not relative terms, and prejudice to the non-movant will often be negligible, since the Rule requires a 4(a)(5) motion to be filed within thirty days of the last day of filing a timely notice of appeal." *Silivanch v. Celebrity Cruises, Inc.*, 333 F3d 355, 366 (2nd Cir. 2003), *citing*, *Lowery v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir.) *cert. denied*, 531 U.S. 929, 121 S.Ct. 309, 148 L.Ed.2d 248 (2000). Turning to the fourth factor, the panel commented, that "...rarely in the decided cases is the absence of good faith at issue." *Silivanch* at 366.

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[4] Again, the four factors are: "[1] the danger of prejudice to the [non-movant]; [2] the length of delay and its potential impact on judicial proceedings; [3] the reason for the delay; including whether it was within the reasonable control of the movant; and [4] whether the movant acted in good faith." *Silivanch v. Celebrity Cruises, Inc.*, 333 F3d 355, 366 (2nd Cir. 2003), *citing*, *Pioneer Inv. Services Co. v. Brunswick Associates*, 507 U.S. 380, 396, 113 S.Ct. 1489, 1498 (1993).

Overall, the panel gave Petitioners *broad* latitude in their analysis, concluding that three of the *Pioneer* factors favored Petitioners and *not* these Respondents. *Silivanch* at 368. Because the appellate court found that the delay, prejudice and good faith factors favor Petitioners, the court turned to the third factor, "the reason for the delay, including whether it was within the reasonable control of movant." *Id.* at 366.

In discussing the 'reason for delay' factor, the appellate court observed: "We have noted that the equities will rarely if ever favor a party who 'fail[s] to follow the clear dictates of a court rule' and held that where 'the rule is entirely clear, we will continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test.'" *Silivanch* at 366-67, *quoting*, *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 249-50 (2nd Cir. 1997) (*per curiam*), *cert. denied*, 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed.2d 117 (1998).

Petitioners argue that their trial counsel was "lead to believe" by Celebrity's counsel that the deadline for filing a notice of appeal from the January 28, 2002 Second Supplemental Judgments was March 4, 2003. Instead, the actual deadline day for filing was February 27, 2003. Petitioners' counsel has represented that he was aware of the thirty-day time limitation for filing a notice of appeal, but argues that his reliance upon the comment of Celebrity's counsel during the February 22, 2003 telephone conference with Staff Counsel - instead of reliance on his calendar - constitutes a mistake rising to the level of 'excusable neglect'. As noted by the court of appeals, "[i]n our view, a lawyer's dependence entirely on a statement made under such circumstances in determining the filing deadline for a notice of appeal is not 'excusable' as we have used that word in related contexts." *Silivanch* at 367.

B. Petitioners' Failure To Follow A Clear Rule Of Court Was Not Excusable Neglect Where The Failure Was Wholly Caused By Petitioners Own Neglect.

Petitioners fail to fully appreciate this Court's holding in *Pioneer* by focusing only on the third factor's "reason for delay" language, and ignoring the impact of the language of the complete holding, which adds, "including whether it was within the reasonable control of movant" *Pioneer* at 1498. Clearly, the reasonableness portion of the fourth factor weighed so heavily against Petitioners, that not even the remaining three factors, held to favor Petitioners, mitigated against the stated reason for delay.

In most reported cases, delay is usually caused by mistakes in interpreting or understanding the law. The lower court opinion in this case refers to numerous cases where mistakes of law had been the cause of the delay, such as a misinterpretation of court rules. *See, e.g. Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248 (2nd Cir. 1997)(Motion to extend time denied where attorney was preoccupied with other affairs, no excusable neglect found where mistake of law in understanding rules); *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994), *cert denied,* 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed. 2d 117 (1998)(Motion to extend time denied where prior notice of appeal was nullified, requiring filing of a second notice of appeal following disposition of post-trial matters. Though a "trap" rule which has since been amended, no excusable neglect found on mistake of law); *United States v. Hooper*, 9 F.3d 257 259 (2nd Cir. 1993)(Denial of motion to extend time where legal assistant's mistake of law caused delay).

However, as framed by Petitioners, this matter involves Petitioners' neglect in calculating the correct date for filing a notice of appeal. Petitioners essentially argue that because

this matter involves a mistake of fact, and not a mistake of law, they should be given more leniency under the *Pioneer* analysis.

This position is untenable. Indeed, as the Second Circuit noted in the opinion below:

> One might attempt to distinguish our decided cases from the ones before us on the ground that they involve mistakes of law and this appeal involves a mistake of fact.... But we think that in this case, at least, it is a distinction that is difficult to sustain and is of little value.

Silivanch at 370. The Second Circuit, however, did address Petitioners' position regarding a differing treatment of a mistake of fact in this matter versus a mistake of law in decisional authority. The panel observed:

> In any event, we see no reason to consider similarly neglectful conduct differently when it is a mistake of law rather than a mistake of fact. We find no justification for treating this case differently than Hooper II, for example, simply because in that case a legal assistant mistakenly thought that the rule called for a thirty rather than a ten day limitation, whereas here, counsel knew there was a thirty day limitation, but neglected to consult a calendar to determine when it expired."

Silivanch at 369.

In view of the absence of *any* effort on the part of Petitioners' counsel to comply with the rules, the time limitations of which he was fully aware, such lack of effort to simply consult a calendar provides no sufficient reason for excuse.

C. A Court May Not Give Carte Blanche Extensions of Time Under *Pioneer*.

Mindful of the omission of Petitioners' counsel in failing to calculate the time limitations for filing a notice of appeal, it is unclear what, if any, standard could be applied which, short of excusing all missed deadlines, would render a different result for Petitioners.

As noted by the Court of Appeals for the Ninth Circuit, "[i]n light of its interpretation of "neglect" as "negligence", the [Supreme] Court said that the "excusable" portion of the term would *provide limitations necessary to prevent abuse* by the parties." *Briones v. Riviera Hotel & Casino*, 116 F. 3d 379, 381 (9th Cir 1997) *(emphasis added)*. Indeed, even under the liberal Pioneer standard, the Court of Appeals for the Sixth Circuit cautioned that, "a district court should not *carte blanche* grant motions for extensions of time under Fed. R. App. P. 4. *U.S. v. Thompson*, 82 F.3d 700, 702 (6th Cir. 1996) *(emphasis added)*.

Somewhat recently, in discussing the "reason for delay" factor, the Bankruptcy Court for the Eastern District of Michigan noted:

> This remaining factor has been referred to as the "law practice upheaval" or "extremely busy" factor. That is a factor which has been emphasized in various cases (and this case as well) that have found the neglect inexcusable, with an overlay in this case to the effect that counsel for Debtors is a sole practitioner and was spending much of his time during the 10- day appeal period in this Court in hearings on various aspects of this very same bankruptcy case. The Supreme Court in *Pioneer* and later lower court cases in this circuit have given the 'law practice upheaval'

> excuse short shrift, or, in the words of the Supreme Court itself, such is deserving of 'little weight.'

In re Bli Farms, 294 B.R. 703 (Bankr.E.D. Mich, 2003), *citing*, *Pioneer*, at 398, 1489. Of course, to be certain, under the more flexible *Pioneer* analysis there are situations where attorney neglect is excusable, even where such neglect was capable of avoidance. However, "notwithstanding the 'flexible' *Pioneer* standard, experienced counsel's misapplication of a clear and unambiguous procedural rule cannot excuse [a] failure to file a timely notice of appeal." *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000).(Where counsel had actual notice of entry of judgment and failed to file timely notice of appeal.)

Pioneer requires more than an excuse, it requires a *satisfactory* excuse. Thus, in a case where counsel filed a notice of appeal one day late because of office inattention and belief that rule permitted 60 day deadline rather than 30 days, the Ninth Circuit observed:

> Although the *Pioneer* standard is more forgiving than the standard in our prior case law, there still must be a *satisfactory* explanation for the late filing.... This Court therefore concludes that the Plaintiff's motion must be denied. To find this neglect "excusable' would only serve to condone and encourage carelessness and inattention in practice before the federal courts, and render the filing deadline set in Fed. R. App. P. 4(a)(1) a nullity.

Graphic Communications, Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1, 5 (1st Cir. 2001) *(emphasis added)*.

Petitioners vigorously argue that the lower court placed too great an emphasis on only one of the factors, to the

detriment of the "balancing" aspects of the *Pioneer* analysis. Yet, at bottom, what Petitioners essentially seek is a *per se* rule that mistakes of fact are always excusable. As noted by the eighth circuit in *Lowry v. McDonnell Douglas Corp*:

> Balancing tests naturally produce indeterminacy; focusing on one factor may change the balance, and, in turn, the result.... [T]he reasons behind some delays will be unexcused no matter what the countervailing factors....

Lowry, 211 F.3d 457, 463, *citing*, *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132, 133 (7th Cir 1996); *Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson, Co.*, 896 F.2d 228, 233 (7th Cir. 1990).

It is all but elementary that the evaluation of the particular facts of a case may, at times, cause one factor to be out of balance with the other three. This is especially true when the reason for delay is a mistake of fact, where the mistake was cause by the very party seeking to have the same mistake considered 'excusable neglect.'

As held last month by the Supreme Court of Vermont in following the 'excusable neglect' holding of the circuit court in *Silivanch*, "[m]any federal courts have taken what we think is an appropriately hard line when it comes to determining when neglect that stems from factors totally within the control of a party or its attorney is 'excusable'." *In re Town of Killington*, 2003 WL 22416506 (Vt. 2003), *citing*, *Silivanch*, 333 F.3d 355.

Notably, Petitioners fail to point to anything in the record that would undermine the lower court's alleged "focusing" on the *Pioneer* delay factor. Petitioners turn a blind eye to the fact that the lower court found all three other factors to favor Petitioners. Indeed, there is nothing in the record that might tend to demonstrate that the tribunal should have given more

weight to the other three *Pioneer* factors then they already had given. Nothing in these cases was overlooked, nor are these matters so unique or novel as to warrant review by this Court.

The Second Circuit carefully considered and balanced all four *Pioneer* factors, correctly concluding that Petitioners' failure to timely file the notice of appeal in these cases did not constitute excusable neglect. As the lower court's decision was in conformity with the dictates of this Court's ruling in *Pioneer* and in uniformity with sister circuits, the petition should be denied.

CONCLUSION

Although the decision below is adverse to Petitioners, if the excusable neglect standard is not to be rendered wholly superfluous, where the facts of neglect are so egregious as they are here, the proper application of the *Pioneer* excusable neglect standard all but demands that appellate jurisdiction be denied.

Respectfully submitted,

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No. 03-573

IN THE

Supreme Court of the United States

ESSEF CORPORATION, PAC-FAB, INC. and STRUCTURAL EUROPE, N.V.,

Petitioners,

v.

JOHN AND JOYCE SILIVANCH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN AND JOYCE SILIVANCH

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STATEMENT OF THE CASE

Petitioners seek review of a lower court's unremarkable, garden-variety application of settled law to particular facts. The Second Circuit below correctly dismissed Petitioners' appeal from a verdict against them because they filed an untimely notice of appeal. Faithfully applying the multi-factor equitable balancing test set forth by this Court in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), the court flatly rejected Petitioners' effort to excuse their untimely filing on the ground that an off-the-cuff comment made by another party's lawyer at a routine scheduling conference somehow "misled" Petitioners about the deadline for their notice of appeal. The court held that such a negligent failure to follow the clear dictates of a procedural rule did not constitute the "excusable neglect" required to excuse an untimely filing.

In a desperate attempt to manufacture an issue worthy of this Court's attention out of the fact-bound, case-specific decision below, Petitioners contend that the Second Circuit "fundamentally restructured" the *Pioneer* test by supposedly focusing exclusively on the so-called "reason for delay" factor and ignoring all other equitable factors – a holding that, according to Petitioners, conflicts with *Pioneer* and with numerous courts of appeals' decisions interpreting and applying *Pioneer*. Petitioners' argument is based upon an outright misreading of the court's decision below. The Second Circuit properly applied this Court's decision in *Pioneer*, and reached a result – rejecting an "excusable neglect" claim where a party fails to follow an unambiguous procedural rule – that is wholly consistent with the result reached by every court of appeals applying *Pioneer* to similar acts of gross attorney negligence. There is no conflict whatsoever between the *actual* decision below and *Pioneer* or the decisions of other courts of appeals, and thus no reason to grant the petition.

The petition also should be denied because this case is an exceedingly poor vehicle in which to resolve Petitioners' (flatly erroneous) contention that the Second Circuit improperly placed exclusive emphasis on *Pioneer*'s "reason for delay" factor. That question – even if it were raised by the decision below (and plainly it is not) – is entirely academic in this case because (i) the district court lacked jurisdiction to excuse Petitioners' untimely filing under *Pioneer* due to Petitioners' failure timely to serve its motion on all of the parties, and (ii) Petitioners' bad faith in initially arguing for an extension of time based on a fabricated excuse (a false claim that they never received notice of the final judgment) is an *additional Pioneer* factor supporting the Second Circuit's holding.

In these circumstances, review by this Court plainly is unnecessary and unwarranted, and Respondents accordingly request that the petition be denied.

1. Factual and Procedural Background.

Respondent John Silivanch sustained permanent brain damage after contracting Legionnaire's Disease on board a Celebrity cruise ship. The United States Centers for Disease Control and Prevention traced the outbreak of the disease to the ship's spa filters that Petitioners Essef Corporation, Pac-Fab, Inc. and Structural Europe N.V. ("Petitioners" or "Essef") designed, manufactured, and distributed. Respondents John and Joyce Silivanch, along with twenty-one other victims of the outbreak, including some who died as a result, filed suit against Celebrity Cruise Lines Inc. and Fantasia Cruising, Inc. ("Celebrity") and Petitioners, alleging strict products liability, breach of implied and express warranty, and gross negligence. Celebrity filed cross-claims against Petitioners for indemnification and other damages. Pet App. 4a.

In May 2000, the parties agreed to try these cases using a "bellwether" procedure. Under that procedure, Respondents John and Joyce Silivanch's case would be tried before a jury on all issues, and the liability and damages findings of that jury (with the exception of findings on proximate cause and compensatory damages) would then be binding in all of the remaining cases. After a six-week trial, a jury found that the defendants were liable to Respondents and awarded them $2.66 million in compensatory damages. The jury also found that Petitioners had an obligation to indemnify Celebrity in full, and that Petitioners were obligated to pay $4.2 million in punitive damages to Respondents and the other plaintiffs, and another $2.8 million to Celebrity. The district court later apportioned the punitive damages award among those plaintiffs who, by trial or settlement, had established the requisite proximate cause, Pet. App. 5a, and awarded Respondents prejudgment interest.

On January 25, 2002, the district court issued and mailed to all parties an order pursuant to Fed. R. Civ. P. 54(b) directing entry of final judgment in each case, and the final judgment itself, denominated the "Second Supplemental Judgment." (The Second Supplemental Judgment ordered post-judgment interest for plaintiffs that had been allocated punitive damages, and recited the prior compensatory awards, prejudgment interest, and punitive damages awards for each plaintiff). Although the Rule 54(b) order was not entered on the docket sheet for the Silivanch Respondents (it was entered on the docket sheets for all other plaintiffs), the final judgment was entered on Respondents' docket sheet on January 28, and mailed to all parties, along with a notice of right to appeal. On February 5, 2002, Robert A. Jacobs, counsel for Respondents, wrote a letter to Petitioners' counsel, Robin G. Weaver, in which Jacobs reminded Weaver that final judgment had been entered on January 28, 2002. Weaver acknowledged receipt of the Jacobs

letter in writing on February 8, and subsequently acknowledged in telephone conversations with Jacobs that final judgment had been entered on January 28. Pet App. 6a-7a.

On February 19, counsel for Celebrity (James M. Hazen), Petitioners (Weaver), and several plaintiffs (Brendan Burke) conducted a pre-argument telephone conference with Second Circuit staff counsel regarding a separate appeal by other plaintiffs. The staff counsel, who was attempting to set a briefing schedule that took into account Petitioners' expected appeals in this case, asked the lawyers when they would know if they were planning to pursue such appeals. In response, Hazen "posited" March 4, 2002 as the "control date" for the appeals in this case, but admittedly had not actually calculated the deadline himself because Celebrity intended to appeal only if Petitioners did. Based on Hazen's statement, Weaver noted March 4 in his calendar as the last day for filing a notice of appeal in this case. Pet. App. 7a.

Petitioners filed a notice of appeal from the January 28, 2002 judgment on March 1, 2002, even though the mandatory and jurisdictional thirty-day deadline for that filing expired on February 27 under Fed. R. App. P. 4(a)(1)(A). On March 29, Petitioners filed a motion in the district court in which they argued that they were entitled to re-open the period for filing a notice of appeal under Fed. R. App. P. 4(a)(6) due to their claimed lack of notice of the entry of the final judgment on January 28, 2002. In the alternative, Petitioners argued that they were entitled to an extension of time in which to file a notice of appeal under Fed. R. App. P. 4(a)(5)(A)(ii), arguing that "excusable neglect" forgiving their untimely filing existed because their counsel had been misled by Hazen's statement at the scheduling conference – a mistaken belief, they asserted, that "persisted" due to their alleged lack of notice of the entry of final judgment.

Pet. App. 8a-9a.[1] Petitioners failed timely to serve their motion for an extension of time on fourteen of the twenty-two plaintiffs whose cases Petitioners sought to appeal, including seven plaintiffs whose punitive damage awards Petitioners sought to attack in their appeal of Respondents' bellwether case. *See* Fed. R. App. P. 4(a)(5)(B) (requiring notice to all parties within Rule 4(a)(5)(A)'s thirty-day grace period); Memorandum in Support of Plaintiffs'-Appellees' Motion to Dismiss the Appeals for Lack of Jurisdiction 7.

At oral argument on Petitioners' motion, Petitioners conceded that they had, in fact, received notice of the January 28 final judgment. As a consequence, they abandoned their request to re-open the filing time period under Rule 4(a)(6), and reformulated their "excusable neglect" argument to omit any reference to their prior, now demonstrably false, assertion regarding their claimed lack of notice of the final judgment. Instead, they limited their "excusable neglect" argument to alleged confusion in the docket and to Hazen's statement at the scheduling conference. Pet. App. 9a. The district court granted Petitioners' motion on May 15. Petitioners filed a second notice of appeal on May 22, at which point Respondents moved to dismiss Petitioners' appeal. Pet. App. 9a.

2. The Second Circuit's Opinion.

The Second Circuit reversed the district court's order granting an extension of time under Rule 4(a)(5), and dismissed the appeal. After discussing its precedents applying *Pioneer*'s

1. Petitioners subsequently raised the argument that the 30-day period had not even begun to run because the January 25 Rule 54(b) order had not been entered in the *Silivanch* docket. Both the district court and the Second Circuit rejected this argument, Pet. App. 13a-16a, and Petitioners do not seek review of this issue in their petition.

"more liberal" definition of "excusable neglect" to Rule 4(a)(5) cases, Pet. App. 16a-17a,[2] the court proceeded to examine Petitioners' claim of "excusable neglect" under *Pioneer*'s four-factor test. It expressly agreed with the district court's conclusion that the first *Pioneer* factor – the risk of prejudice – favored an extension of time, reasoning that the hardship to Petitioners in being denied "the opportunity to appeal a multimillion dollar verdict" outweighed any prejudice to Respondents resulting from a modest time extension. Pet. App. 19a; *id.* (noting that, in the context of "excusable neglect" claims under Rule 4(a)(5), the "'prejudice to the non-movant will often be negligible'") (quoting *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000)). And for similar reasons, the court held that the second *Pioneer* factor – the length of the delay – favored Petitioners because Rule 4(a)(5) requires a motion for an extension of time to be filed within thirty days of the last day for filing a timely notice of appeal. Pet. App. 17a.

Even though these two *Pioneer* factors pointed in favor of an "excusable neglect" finding, and despite the court's expression of "considerable sympathy for those who, through mistakes . . . lose substantial rights" by missing deadlines, Pet. App. 20a, the court nonetheless concluded that Petitioners' neglect could not be excused. It explained that "the legal system would groan under the weight of a regimen of uncertainty in

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2. Respondents note that, although this Court subsequently observed in *Stutson v. United States*, 516 U.S. 193 (1996), that six courts of appeals unanimously had held that *Pioneer* applies to Rule 4 cases, this Court has never expressly so held. Thus, in order even to reach the merits of the question presented by Petitioners, this Court first would have to decide this threshold question and formally extend *Pioneer*'s framework to the Rule 4 context. This potential barrier to this Court's ability to reach the merits of the petition also counsels against a grant of certiorari.

which time limitations were not rigorously enforced – where every missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of enforcing the bar." *Id.* at 20a-21a. Accordingly, the court reaffirmed its longstanding rule that the "equities will *rarely if ever* favor a party who 'fail[s] to follow the clear dictates of a court rule'" and that "where 'the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, *in the ordinary course*, lose under the *Pioneer* test.'" Pet. App. 18a (quoting *Canfield v. Van Atta Buick/GMC Truck Inc.*, 127 F.3d 248, 250-51 (2d Cir. 1997)) (per curiam) (emphasis added); *id.* at 21a (stating that the "mere 'possibility that a court may properly find excusable neglect [where it consists of inadvertence, ignorance of the rules, or mistakes construing the rules does not] alter[ ] the principle that failure to follow the clear dictates of a court rule *will generally not constitute such excusable neglect*'") (quoting *Canfield*, 127 F.3d at 250) (alterations in original) (emphasis added).

Applying this rule, the court held that it was

> compelled, *on these facts*, to conclude that the district court abused its discretion when it decided that Essef's counsel's determination of the wrong date by which Essef had to file a notice of appeal in sole reliance on a remark by counsel for another party during a scheduling conference for another appeal constituted excusable neglect.

Pet. App. 25a (emphasis added); *id.* at 23a (finding "nothing exceptional about Hazen's comment or its context that should relieve Essef of responsibility for its own compliance with the rules of procedure") Finally, the court considered the argument that a so-called "mistake of fact" in following the clear dictates

of a rule is more easily excused than a "mistake of law." It held that in the circumstances of this case – *i.e.*, where an attorney knew of the existence of a thirty-day time limitation "but neglected to consult a calendar to determine when it expired," *id.* at 23a – no such distinction meaningfully could be drawn for purposes of assessing Petitioners' culpability. *Id.*[3]

REASONS FOR DENYING THE PETITION

The petition should be denied for three reasons. *First*, there is no conflict whatsoever between the decision below and this Court's decision in *Pioneer*. The Second Circuit applied *Pioneer*'s four-factor test governing "excusable neglect" for untimely filings, and, pursuant to that test, properly concluded that Petitioners' negligent and unexplained failure to follow an unambiguous procedural rule constituted inexcusable neglect. *Second*, the alleged conflicts between the Second Circuit's decision and the decisions of other courts of appeals are equally fanciful. In fact, the courts of appeals are in *complete unanimity* in rejecting claims of "excusable neglect" that, like Petitioners', consist of nothing more than a lawyer's negligent failure to follow an unambiguous procedural rule. *Third*, the petition should be denied because this case is an exceedingly poor vehicle in which to address Petitioners' contention that a court may not

3. The court also flatly rejected Petitioners' claim that "excusable neglect" existed because of confusion in the record – specifically, confusion as to when the judgment below became final, thus triggering the thirty-day notice of appeal period. It noted that Petitioners had not relied upon any such confusion in their Rule 4(a)(5) motion, and that Petitioners received clear notice that final judgment had been entered on January 28, 2002. Accordingly, the court affirmed the district court's implicit finding that the *sole* cause of Petitioners' late filing was their reliance on the statement by Celebrity's counsel, Pet. App. 25a-26a – a cause that, for reasons explained above, is legally insufficient to excuse Petitioners' untimely filing.

focus exclusively on the "reason for delay" factor. It is a poor vehicle in which to address that question because (i) the district court lacked authority to grant an extension of time under *Pioneer* due to Petitioners' failure timely to serve their motion on all the parties, and (ii) even if the court had such authority, uncontradicted evidence of Petitioners' bad faith in seeking an extension – an additional *Pioneer* factor that Petitioners conveniently ignore – provides an additional equitable ground supporting the Second Circuit's holding, and thus renders Petitioners' (misplaced) challenge to the court's "exclusive" emphasis on one *Pioneer* factor completely academic.

I. The Opinion Below Properly Interpreted and Applied this Court's Decision in *Pioneer*.

Petitioners' main argument in seeking review by this Court is that the Second Circuit's opinion "fundamentally restructures," and indeed "open[ly] disregard[s]," this Court's decision in *Pioneer*. Pet. 7-8. The Second Circuit's opinion does no such thing. To the contrary, the court below faithfully applied *Pioneer*'s equitable balancing test to the particular facts of this case, and properly concluded that Petitioners' negligence in failing to calculate a deadline under an unambiguous procedural rule – their counsel having chosen instead to rely upon a date "posited" by another party's attorney – did not constitute excusable neglect. There is plainly no conflict between this holding and *Pioneer*, and thus no need or justification for this Court to review what is essentially a lower court's garden-variety application of well-settled law to case-specific facts.

In *Pioneer*, this Court interpreted the term "excusable neglect" in the context of a Bankruptcy Rule permitting untimely filings upon a showing that "the failure to act was the result of excusable neglect." *Pioneer*, 507 U.S. at 383 & n.2 (quoting

Fed. R. Bank. P. 9006(b)). The Court's principal holding was that "excusable neglect" is not limited to circumstances beyond the reasonable control of the late filer, and thus is potentially satisfied even where the late filer is somehow at fault. *Id.* at 388. The Court went on to articulate standards governing the requirement that the neglect be "excusable" – standards it intended to "deter . . . parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve." *Id.* at 395. The Court held that the determination of "what sorts of neglect will be considered 'excusable'" is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* These circumstances include "[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.*[4] The Court further observed that "inadvertance, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect." *Id.* at 392. Given the lack of prejudice to the non-movant in granting an extension, the good faith of the movant, and a "dramatic ambiguity" in the "unusual form of notice" causing the movant's counsel to miss the filing deadline, the Court concluded that the neglect at issue was excusable. *Id.* at 398-99.

The Second Circuit's decision below was fully consistent with these principles. Petitioners' entire argument to the contrary is based on their unfounded assertion that the Second Circuit "held that a finding on a single *Pioneer* factor [*i.e.*, the reason

4. Reaffirming the longstanding rule that "clients must be held accountable for the acts and omissions of their attorneys," the Court also held that neglect by an attorney is just as relevant to the excusable neglect inquiry as is neglect by a party itself. *Id.* at 396.

for delay] extinguishes a district court's discretion to weigh any other relevant factors," and that, in so holding, the court "fundamentally restucture[d]" the *Pioneer* equitable balancing test. Pet. 7; *see also id.* at 9-10 (asserting that Second Circuit treated the "reason for delay" *Pioneer* factor as "dispositive," thus rendering "superfluous" the remaining three *Pioneer* factors).

This Court need only read the lower court's opinion to recognize the transparent falsity of Petitioners' assertion. As shown above, *see supra* at 5-8, the Second Circuit in no way held that the "reason for delay" factor is necessarily "dispositive," nor did it treat as "superfluous" the remaining *Pioneer* factors. On the contrary, the court expressly held that two of the *Pioneer* factors – the length of the delay, and the prejudice to the non-movant – actually supported Petitioners' request for an extension.[5] Yet, notwithstanding these two equitable factors weighing in Petitioners' favor, the court nonetheless concluded that Petitioner failed to demonstrate "excusable neglect."

The court reached this conclusion based on the well-settled rule that a "failure to follow the clear dictates of a court rule

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5. Respondents argued in support of their motion to dismiss the appeal that Petitioners' lack of good faith in seeking an extension of time in which to file a notice of appeal – an additional *Pioneer* factor – argued heavily against any finding of excusable neglect. Memorandum in Support of Plaintiffs'-Appellees' Motion to Dismiss the Appeals for Lack of Jurisdiction 14-15. The Second Circuit declined to address this argument, noting only that, as a general matter, good faith is rarely at issue in excusable neglect cases. Pet. App. 17a. As explained below, Petitioners' lack of good faith in initially arguing for an extension of time based in part on a completely fabricated assertion – *i.e.*, their false claim to having never received notice of the January 28 final judgment – makes this case a particularly poor vehicle in which to address the question presented by the petition. *See infra* at 24-26.

will generally not constitute . . . excusable neglect." Pet. App. 21a; *see id.* at 18a (stating that the "equities will rarely if ever favor a party who fail[s] to follow the clear dictates of a court rule, and that "where the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test"). Here, the applicable court rule imposing a thirty-day time period for the filing of a notice of appeal – Rule 4 – is unambiguous. And Petitioners' only "explanation" for their failure to follow that "clear dictate[]" was their counsel's decision not to calculate the filing deadline simply because another party's lawyer "posited" the (incorrect) date at a scheduling conference. The court below held that, "*on these facts*," it was compelled to conclude that Petitioner failed to establish excusable neglect. Pet. App. 25a (emphasis added); *see also id.* at 19a ("In our view, a lawyer's dependence entirely on a statement made *under such circumstances* in determining the filing deadline for a notice of appeal is not 'excusable' as we have used that word in related contexts.") (emphasis added).

In other words, the plain language of the opinion demonstrates conclusively that the Second Circuit engaged in the very equitable balancing that Petitioners erroneously claim the court eschewed. Petitioners' real complaint seems to be with the equitable rule – applied by the court below and adopted by every federal court of appeals to consider it (*see infra* at II) – that a failure to follow the "clear dictate" of a court rule *ordinarily* precludes a finding of excusable neglect. But Petitioners could not, and do not, argue that that rule is in any way inconsistent with *Pioneer* because, as Petitioners concede, Pet. 10 n.2, this Court recognized and endorsed that very rule in *Pioneer* itself. *Pioneer*, 507 U.S. at 392 (stating that

"inadvertance, ignorance of the rules, or mistakes construing the rules *do not usually constitute* excusable neglect.").[6]

Unable to demonstrate any conflict at all between that rule and *Pioneer*, Petitioners' request for review ultimately boils down to their footnote suggestion that that rule somehow does not apply to the facts of this case. Pet. 10 n.2 (explaining away *Pioneer*'s statement that inadvertance, ignorance of the rules, and mistakes construing the rules are presumptively inexcusable on the ground that "here, there is no contention that Essef's lawyer acted inadvertently with regard to the existence of Federal Rule of Appellate Procedure 4, ignored the content of that rule, or mistakenly construed that rule"; rather, Essef's lawyer here allegedly made only a "mistake of fact in calculating the appeal period").

The suggestion is, in a word, extraordinary: If the failure to calculate an applicable deadline for oneself – relying instead on the guestimate of *another party's attorney* – is not "inadvertence," or a plain disregard of the rules, it is difficult to

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6. Petitioners suggest that there is some inconsistency between this rule and the "liberal understanding" of excusable neglect adopted in *Pioneer*. Pet. 10; *Stutson v. United States*, 516 U.S. 193 (1996). But the suggestion is plainly frivolous because, as noted, this Court recognized, and endorsed, that very same rule in *Pioneer*. Moreover, Petitioners overlook the critical fact that the Second Circuit, as the court explained below, modified its former categorical rule precluding any finding of "excusable neglect" in these circumstances precisely because of *Pioneer*'s "more liberal" framework. Pet. App. 16a (explaining that *Pioneer* led Second Circuit to modify prior rule that "the excusable neglect standard *can never be met* by a showing of inability or refusal to read and comprehend the plain language of the federal rules," and to adopt instead the rule that such failures ordinarily do not constitute excusable neglect) (emphasis added); *see also Canfield*, 127 F.3d at 250 (observing that prior *per se* rule does not "perdure after *Pioneer*").

see what would be. *See Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996) (stating, in context of claimed excusable neglect based on misreading of unambiguous rules, that "[i]f there was 'excusable' neglect here, we have difficulty imagining a case of inexcusable neglect"). Moreover, as the Second Circuit properly held, Petitioners' attempt to characterize their lawyer's negligent failure to apply the governing law himself as some sort of innocuous "mistake of fact" is completely unpersuasive and must fail. Pet. App. 22a-23a (holding that there is no justification for distinguishing between an attorney's failure to understand the applicable time period set forth by a clear rule, an attorney's miscalculation of the deadline under that rule, or, as here, an attorney's negligent failure even "to consult a calendar to determine" when the deadline expired).[7] In any event, this fact-bound, case-specific

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7. Petitioners argue, unconvincingly, that the "Second Circuit has effectively rendered the 'excusable neglect' standard of Rule 4 a nullity with no room to operate" because "there is nothing in terms of culpability to distinguish a mistake of fact from any other type of neglect that might cause a notice of appeal to be untimely." Pet. 11 n.2. Whatever the merit of distinguishing degrees of culpability between a "mistake of law" and a true "mistake of fact," *see Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) (distinguishing prior "mistake of fact" case concerning "whether a message was delivered"), the "mistake" at issue in this case – a failure even to consult or to apply governing law in reliance on the surmise of another party's attorney – cannot meaningfully be classified as a mistake of fact. Thus, Petitioners' characterization of the Question Presented in this case as the question whether an attorney's "mistake of fact" precludes consideration of other equitable factors is doubly incorrect: The court below did not hold that Petitioners' mistake precludes any such equitable consideration, and that "mistake" was quite obviously not a "mistake of fact." Moreover, regardless of the label applied, the unstated premise of Petitioners' argument – *i.e.*, that an attorney's negligent failure even to consult the

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question of whether Petitioners' attorney's conduct constitutes "inadvertence, ignorance of the rules, or mistakes construing the rules" within the meaning of *Pioneer,* or under the general rule that a failure to follow an unambiguous rule ordinarily does not constitute "excusable neglect," is quite obviously undeserving of review by this Court.

II. Every Court of Appeals to Consider the Question Has Held that A Failure to Follow the Clear Dictates of a Rule Does Not Ordinarily Constitute Excusable Neglect.

Petitioners further argue that this Court "should intervene to resolve the multiple and mature splits of authority caused by the Second Circuit's decision." Pet. 11. But the opinion below did not "cause" any of the so-called "splits of authority" described in the petition. Rather, those "splits" are the result of Petitioners' outright mischaracterization of the Second Circuit's opinion for the purpose of manufacturing legal conflicts warranting this Court's review. There are no such conflicts – mature or otherwise – and thus no warrant at all for this Court's intervention.

Before turning to these alleged but fictitious conflicts, it is crucial first to point out what Petitioners entirely, and misleadingly, omit from their discussion of the case law interpreting *Pioneer*. Namely, *every federal court of appeals* to address the question has held, just as the Second Circuit did below, that a failure to follow the clear dictates of a court rule generally does not constitute "excusable neglect." *See Advanced*

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rules or to attempt to apply them is somehow *less culpable* than a good faith legal mistake in *actually* applying them – is simply mystifying. Petitioners cite no decision so holding, nor are Respondents aware of any case standing for such an extraordinary proposition.

Estimating Sys., Inc. v. Riney, 130 F.3d 996, 998 (11th Cir. 1997) (stating that "no circuit that has considered the issue after *Pioneer* has held that an attorney's failure to grasp the relevant procedural law is 'excusable neglect,' and holding "as a matter of law[] that an attorney's misunderstanding of the plain language of a rule cannot constitute excusable neglect.").[8]

This rule is, as discussed above, fully consistent with *Pioneer*. *Pioneer*, 507 U.S. at 392 (stating that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect"). Indeed, to read *Pioneer* to dictate a different conclusion would, as several Circuits have recognized, invite "almost every appellant's lawyer [to] plead

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8. *Graphic Communications Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 8 (1st Cir. 2001) (even where delay was brief and prejudice minimal, absent extraordinary circumstances excusable neglect is not present where untimely filing is the result of "ignorance of the law and inattention to detail"); *Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 879 (5th Cir. 1998) (holding that it would be the "rare case indeed" in which a misinterpretation of federal rules may constitute excusable neglect); *Prizevotis v. Indiana Bell Tel. Co.*, 76 F.3d 132, 133 (7th Cir. 1996) ("'The excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules.'") (quoting *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 515 (2d Cir. 1985)); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000) ("Notwithstanding the 'flexible' *Pioneer* standard, experienced counsel's misapplication of clear and unambiguous procedural rules cannot excuse his failure to file a timely notice of appeal."); *Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 825 (9th Cir. 1996) (*Pioneer* did not alter "general rule that a mistake of law does not constitute excusable neglect"; in absence of persuasive justification for misconstruction of nonambiguous rules, general rule forecloses finding of excusable neglect); *see also Deym v. von Fragstein*, 127 F.3d 1102 (6th Cir. 1997) (unpub. opinion) (remarking that post-*Pioneer* cases establish that misreading a rule or statute does not constitute excusable neglect).

his own inability to understand the law when he fails to comply with a deadline." *Advanced Estimating Sys.*, 130 F.3d at 998 (noting consistency between *Pioneer* and rule that "lawyer's misunderstanding of clear law cannot constitute excusable neglect," and rejecting notion that this Court in *Pioneer* "intended a practice that would require courts to be that lenient about disobedience to plain law"); *Graphic Communications*, 270 F.3d at 8 (to excuse error caused by "ignorance of the law and inattention to detail" would "only serve to condone and encourage carelessness and inattention in practice before the federal courts, and render the filing deadline" of Rule 4 a "nullity").

In light of this complete harmony, if not unanimity,[9] among the federal courts of appeals on the specific rule applied by the Second Circuit below, Petitioners' claim of "multiple and

9. To the extent the courts of appeals differ over the precise formulation of this rule, the difference cannot possibly warrant this Court's review. While the Second Circuit holds that a failure to follow an unambiguous rule *ordinarily* is inexcusable, several other Circuits have gone *much further* and held that such a failure *never* can constitute excusable neglect. *See, e.g., Prizevotis*, 76 F.3d at 133; *Lowry*, 211 F.3d at 464; *Advanced Estimating Sys.*, 130 F.3d at 998; *but cf. In re: Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209 (D.C. Cir. 2003) (expressing reservation in dicta concerning *per se* rule, but recognizing that such a rule might be appropriate in the context of untimely notices of appeal). Clearly, if either of these rules warranted review by this Court (and neither of them does), surely the appropriate candidate would be the more stringent *per se* rule adopted by other Circuits, and not the Second Circuit's more moderate, flexible approach – an approach that, as noted above, the court adopted to replace its prior *per se* rule in order to comply more fully with *Pioneer*. *See supra* n. 6. In any event, the difference between the Second Circuit's rule and the *per se* rule of other Circuits is not a difference that could possibly help Petitioners here since the Second Circuit rejected Petitioners' excusable neglect claim even under its more liberal standard.

mature" splits of authority is demonstrably incorrect. The cases Petitioners advance to support these "conflicts" simply confirm that the purported conflicts are illusory. The first "conflict" to which petitioners point is between the Second Circuit, which allegedly holds that a single *Pioneer* factor is dispositive, and the Ninth, Third, and Fifth Circuits, which "have taken the position – faithful to *Pioneer* – that an equitable balancing of all relevant factors is required for a determination of 'excusable neglect.'" Pet. 11-13 (discussing *Bateman v. United States Postal Serv.*, 231 F.3d 1220 (9th Cir. 2000); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315 (3d Cir. 2001); and *In re Eagle Bus. Mfg., Inc.*, 62 F.3d 730, 736-40 (5th Cir. 1995)). Once again, the claimed conflict assumes that the Second Circuit does not *also* require an equitable balancing of all relevant factors. As shown above, *see supra* at 9-15, this assumption is baseless.

Second, Petitioners point to a supposed conflict "over which of the four *Pioneer* factors are entitled to the greatest weight in an excusable neglect analysis." Pet. 13. On one side of the claimed split are courts of appeals that, like the Second Circuit, place the greatest emphasis in the *Pioneer* balancing on the "reason for delay" factor. Pet. 14-15 (citing *Lowry*, 211 F.3d at 463; *Graphic Communications*, 270 F.3d at 5; and *United States v. Thompson*, 82 F.3d 700, 702-03 (6th Cir. 1996)). On the other side of this conflict, Petitioners assert, are decisions of the Eleventh and Seventh Circuits allegedly holding that the "prejudice" and "efficient administration of justice" *Pioneer* factors are to be afforded "primary importance." Pet. 13-14 (discussing *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996); *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1297 (11th Cir. 2003); and *United States v. Brown*, 133 F.3d 993, 996 (7th Cir. 1998)).

Once again, the claimed split does not exist. Nothing in the decisions of the Seventh or Eleventh Circuits remotely suggests, as Petitioners claim, that the general importance given to the "prejudice" and "administration of justice" *Pioneer* factors trumps the well-settled rule that a failure to follow the clear dictates of a rule ordinarily precludes a finding of excusable neglect. Indeed, not one of the decisions cited by Petitioners even implicated that particular rule.[10] Where that rule is implicated, the Seventh and Eleventh Circuits, just like the Second Circuit, routinely and decisively reject claims of excusable neglect. *See Advanced Estimating Sys.*, 130 F.3d at 997-98 (applying rule and rejecting excusable neglect claim where party's attorney misunderstood that ten-day period for filing post-trial motion ran from entry of judgment, not from date on which notice was received); *Prizevoits*, 76 F.3d at 133-34 (same where "highly experienced federal litigator" erroneously believed ten-day period for filing post-trial motion could be extended because attorney was new to case; "the rule is crystal clear, the error egregious, the excuses so thin as to leave the lapse not only unexcused, but inexplicable.").[11]

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10. *Cheney*, 71 F.3d at 850 (claimed reason for delay was a "failure of communication" between two lawyers); *Advanced Estimating Sys.*, 130 F.3d at 999 (subsequent panel applying rule that Second Circuit applied here, and distinguishing *Cheney* as a "miscommunication case or a clerical-error case"); *In re Worldwide Web Sys.*, 328 F.3d at 1297 (emphasizing that all of the *Pioneer* factors must be considered, and finding no excusable neglect in part where moving party failed to offer *any* reason at all for the delay); *Brown*, 133 F.3d at 997 (finding excusable neglect where counsel completely inexperienced in federal court system misunderstood applicable rule, but reaffirming principle adopted in *Prizevotis* that "the reasons behind some delays will be unexcused no matter what the countervailing factors").

11. In fact, it is particularly ironic that Petitioners would point to the Eleventh and Seventh Circuits as courts that give *less* emphasis to (Cont'd)

Finally, Petitioners point to "an additional divide over what type of conduct is deemed 'excusable' for purposes of the third *Pioneer* factor, *i.e.*, the reason-for-delay." Pet. 15. In the first place, this last alleged conflict is, as stated *by Petitioners*, an alleged conflict over the *application* of a settled legal standard to the facts of particular cases – which is *not* the sort of conflict ordinarily warranting review by this Court. *See* Sup. Ct. Rule 10. In any event, the cases Petitioners cite do not at all conflict over the application of the "reason for delay" factor to particular cases. Petitioners first cite *Bateman v. United States Postal Service*, 231 F.3d 1220, 1224-25 (9th Cir. 2000), for the general proposition that "conduct is excusable if the reason for delay suggests, as in the case of Essef's counsel, mere negligence or carelessness." Pet. 15. But *Bateman* involved the plainly distinguishable facts of an attorney who missed a deadline because he was forced to leave the country for a family emergency. *Bateman*, 231 F.3d at 1222-25. On the facts at issue here, by contrast, well-settled Ninth Circuit precedent dictates the precise conclusion that the Second Circuit reached below. *See, e.g., Kyle v. Campbell Soup Co.*, 28 F.3d 928, 931 (9th Cir. 1994) (no excusable neglect where attorney miscalculated deadline under unambiguous rule without persuasive justification); *Yost*, 92 F.3d at 825 (same); *United States v. Prairie Pharmacy, Inc.*, 921 F.2d 211, 214 (9th Cir. 1990) (attorney's "failure to verify the requirements of the law demonstrates attorney malpractice, not excusable neglect under the law of this circuit").

(Cont'd)
the "reason for delay" factor than does the Second Circuit because, as noted above, these Circuits have gone *further* than the Second Circuit and adopted a *per se* rule precluding excusable neglect where an attorney misunderstands or fails to follow an unambiguous rule. *See supra* at 17 & n.9; *Advanced Estimating Sys.*, 130 F.3d at 998; *Prizevoits*, 76 F.3d at 133.

Petitioners also cite *Yesudian ex rel. United States v. Howard University*, 270 F.3d 969 (D.C. Cir. 2001), in which the court found excusable neglect despite an attorney's "foolish" mistake in applying the wrong court's rules. *Id.* at 971. But *Yesudian's* discussion of the "excusable neglect" standard was dicta because the applicable local rule – unlike Rule 4's mandatory and jurisdictional thirty-day time-period for filing a notice of appeal – was discretionary and permitted acceptance of a late filing even without consideration of the "excusable neglect" standard. *Id.* Moreover, the court's discussion of that standard is simply beside the point because *Yesudian* was not a Rule 4 case involving an untimely notice of appeal. Rather, it involved an untimely opposition brief accepted by a district court – a decision that the court in *Yesudian* expressly noted was a "case management decision[]" entitled to "great deference," *id.*, and that the D.C. Circuit subsequently has recognized must be analyzed quite differently from a decision to excuse an untimely notice of appeal. *See In re: Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1210 (D.C. Cir. 2003) (distinguishing application of excusable neglect standard to district court's case-management decisions from the Rule 4 context, which presents "an issue of special interest to the courts of appeal"). Finally, *Yesudian* is plainly distinguishable because it involved an attorney's legal mistake that, according to the court, was justified because of an apparent error in the Westlaw database. *Yesudian*, 270 F.3d at 971 (noting that any "researcher looking in Westlaw" could have been misled into making the same mistake). Thus, the rule that a failure to follow an *unambiguous* procedural rule generally forecloses a claim of excusable neglect was plainly not applicable in *Yesudian*. *Accord Pioneer*, 507 U.S. at 398 (excusing neglect where notice informing party of deadline contained a "dramatic ambiguity" that could confuse

experienced bankruptcy practitioners); *compare Kyle*, 28 F.3d at 931 (distinguishing cases involving ambiguous rules, such as *Pioneer*, from claims of excusable neglect involving unambiguous rules).

III. This Case Would Be An Exceedingly Poor Vehicle For Resolving the Question Presented.

Even if there were some need for this Court to provide further clarification or guidance on the proper application of *Pioneer*'s equitable balancing test – and there is not – for two reasons this case would be an exceedingly poor vehicle in which to do so.

First, regardless of the conclusion dictated by *Pioneer*'s equitable balancing test, the district court was nonetheless obligated to reject Petitioners' request for an extension of time in which to file their notice of appeal under Rule 4(a)(5). The court was so obligated because Petitioners failed to serve their Rule 4(a)(5) motion on *all the parties* to this action – including seven of the twelve plaintiffs who are entitled to share in the punitive damages award rendered in Respondents' bellwether case – within the thirty-day grace period set forth in Rule 4(a)(5). And it is well-settled that a failure timely to comply with Rule 4(a)(5)(B)'s "mandatory and jurisdictional" notice and service requirement deprives the district court of jurisdiction to entertain a Rule 4(a)(5) motion. *Hamzi v. Minnesota Mut. Life Ins. Co.*, 196 F.3d 372, 373 (2d Cir. 1999); *Oda v. Transcon Lines Corp.*, 650 F.2d 231, 233 (10th Cir. 1981); *Hable v. Pairolero*, 915 F.2d 394, 396 (8th Cir. 1990); *Malone v. Avenenti*, 850 F.2d 569, 572-73 (9th Cir. 1988); *Truett v. Johns-Manville Sales Corp.*, 725 F.2d 1301, 1302 (11th Cir. 1984).

Respondents advanced this argument in their motion to dismiss the appeal for lack of jurisdiction, but the Second Circuit declined to address it. Thus, in order for this Court even to reach

the merits of the question presented by the petition, the Court first would be compelled to resolve this antecedent jurisdictional question. And if the Court ultimately were to conclude, as Respondents maintain it must, that the district court lacked any authority even to apply *Pioneer*'s equitable test given Petitioners' failure to comply with Rule 4(a)(5)'s service and notice requirement,[12] a grant of certiorari on the *Pioneer* question ultimately would be for naught. The presence of this threshold procedural obstacle to this Court's ability to address the merits of the question presented is an additional reason to deny the writ of certiorari.

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12. Petitioners likely will argue, as they did below, that the purpose behind the notice requirement is satisfied here, despite their service failures, because all of the parties received *actual notice* of the Rule 4(a)(5) motion through the court's briefing schedule. But even if actual notice absent formal service were sufficient to satisfy Rule 4(a)(5)'s requirements – Petitioners cited no case so holding below – the rule nonetheless requires, at the least, that such notice be received *within* the 30-day grace period. Fed. R. App. P. 4(a)(1), 4(a)(5)(B). Because that grace period elapsed on March 29, 2002 – several days *before* the district court sent notice of Petitioners' motion to the parties – Petitioners cannot possibly show that the parties had "actual notice" within the relevant time period. (Indeed, Petitioners failed even to *file* their motion with the court by March 29; the district court, however "deemed" the motion filed as of that date. *See* Memorandum in Support of Plaintiffs'-Appellees' Motion to Dismiss the Appeals for Lack of Jurisdiction 17 n.6). Petitioners further argued below that they complied with Rule 4(a)(5)'s notice and service requirements because they timely served counsel for Respondents John and Joyce Silivanch, who acted as *liaison* counsel to the other plaintiffs in this action. This argument is meritless, however, because the rule requires service on all, not some, of the parties, and Respondents' counsel clearly did not represent the other plaintiffs And it is undisputed that Petitioners failed to provide timely notice to fourteen of the twenty-two plaintiffs whose cases they sought to appeal by means of their Rule 4(a)(5) motion.

Second, even if the district court had authority to grant an extension of time under *Pioneer*, this case is clearly the wrong vehicle for this Court to resolve the question presented. It is the wrong vehicle because one of the additional *Pioneer* factors – whether the party seeking an extension acted in good faith, *Pioneer*, 507 U.S. at 395 – weighs heavily against Petitioners. As described above, Petitioners first argued that their untimely filing constituted "excusable neglect," in part, because they did not have notice of the final judgment. But Petitioners later were compelled to abandon this contention given uncontradicted evidence that they did, in fact, have such notice. In other words, by conceding notice of the date of the final judgment, Petitioners effectively admitted that their first effort to obtain equitable relief for their untimely filing was supported, in part, on a complete fabrication, and thus not offered in "good faith" under *Pioneer*. *See* Pet. App. 26a & n.12 (holding that Petitioners "did indeed receive clear notice that final judgment had been entered").

Although Respondents presented this bad faith argument to the Second Circuit, the court, applying the rule governing negligent failure to follow the dictates of unambiguous rules, had no occasion to address it. Petitioners appear to assume that the issue of their lack of good faith is thus no longer relevant: Although they argue repeatedly that the Second Circuit erred by failing adequately to consider *all* of the *Pioneer* equitable factors, they conveniently, and misleadingly, omit any discussion of this important equitable factor.[13] But it is indisputable that, if

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13. Indeed, indicating a tacit awareness that their bad faith may be fatal to their "excusable neglect" claim, and compounding their pattern of misrepresentations in this case, Petitioners, shockingly, *misrepresent Pioneer*'s test in the petition as excluding a good faith requirement altogether. *See, e.g.*, Pet. 9 ("This Court [in *Pioneer*] provided a framework with which to analyze [excusable neglect] claims, including

(Cont'd)

this Court were to grant the petition, it could not reverse the decision below without deciding whether Petitioners' conduct constituted bad faith, and if so, how such bad faith affects the equitable calculus under *Pioneer*. *Cf. Pioneer*, 507 U.S. at 398 (reversing lower court's rejection of excusable neglect claim on the ground that court focused only on reason for delay factor, but noting that it would have affirmed had there been "any indication at all of bad faith"). This additional fact-sensitive inquiry standing between Petitioners and any potential relief by this Court makes a grant of certiorari particularly inappropriate.

Indeed, the evidence of Petitioners' bad faith not only seriously complicates the *Pioneer* analysis that this Court would be required to undertake if it were to grant the petition; it actually renders *irrelevant* (or at least potentially so) the question presented. The thrust of Petitioners' complaint is that the Second Circuit gave exclusive emphasis to *Pioneer*'s "reason for delay" factor and simply ignored the remaining equitable factors. As Respondents demonstrated above, the argument is patently false because the court considered several equitable factors as part of its analysis. In any event, if this Court were inclined to address the question whether a lower court may place "exclusive" emphasis on the "reason for delay" factor, surely it should do so in a case in which that factor is the *only* plausible equitable ground supporting a lower court's rejection of an "excusable neglect" claim. Where, as here, a lower court's excusable neglect holding can be, and is, supported by the

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(Cont'd)
four specific factors: (1) prejudice to other parties; (2) length of the delay; (3) reason for the delay; and, (4) effect on judicial proceedings.") (citing *Pioneer*, 507 U.S. at 395); *see id.* at 2 (same). But the very page of the *Pioneer* opinion to which Petitioners point unambiguously includes "good faith" as one of the four relevant equitable circumstances comprising the "excusable neglect" test.

additional equitable circumstance of "bad faith," the issue of a court's "exclusive" emphasis on the "reason for delay" factor becomes purely academic, and thus entirely unsuitable for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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(4)

No. 03-573

IN THE

Supreme Court of the United States

ESSEF CORPORATION, PAC-FAB, INC., AND STRUCTURAL EUROPE N.V.,

Petitioners,

v.

JOHN AND JOYCE SILIVANCH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONERS

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RULE

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REPLY BRIEF OF PETITIONERS

Petitioners have demonstrated that the decision below is in conflict with decisions of this Court and of other courts of appeals on an important element of federal judicial procedure: namely, whether an attorney's good-faith mistake of fact precludes a finding of excusable neglect under *Pioneer Investment Services Co.* v. *Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), even in the absence of any prejudice to other parties, delay, or any impact on judicial proceedings. Pet. 9-17. In their opposition, respondents draw irrelevant legal distinctions and make unfounded claims that this case is not the proper vehicle for resolving those conflicts of authority. Their arguments lack force.

A. Respondents' suggestion (Silivanch Opp. 9) that the Second Circuit "faithfully applied" the equitable analysis this Court set forth in *Pioneer* is demonstrably wrong. In *Pioneer*, this Court directed trial courts making an "excusable neglect" determination to engage in an equitable balancing of "'all relevant circumstances,'" including four specific factors: "'[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.'" Pet. App. 17a (alterations in original) (quoting *Pioneer*, 507 U.S. at 395).

As an initial matter, respondents' claim that the Second Circuit "engaged in the very equitable balancing" that *Pioneer* commands, Silivanch Opp. 12; Hague Opp. 20, mistakes the role of a reviewing court. The balancing of relevant circumstances, including the *Pioneer* factors, is committed by Rule 4(a)(5) to the *district court*. The Second Circuit did not engage in balancing; rather, it held, under an abuse-of-discretion standard, that the district court was not entitled to give any weight to any factor other than the reason for delay (*i.e.*, to balance the factors). Pet. App. 19a-21a.

It is thus of no moment that the Second Circuit correctly recited the *Pioneer* factors, and "conclud[ed] that three of the *Pioneer* factors favored Petitioners and *not* these Respondents." Hague Opp. 21; Silivanch Opp. 11. The critical point is that the Second Circuit eliminated the discretion of the trial court to engage in an equitable balancing of the three factors favorable to petitioners (lack of prejudice, lack of impact on judicial proceedings from minuscule delay, and good faith) against the sole factor (reason for delay) that was unfavorable. That is squarely in conflict with *Pioneer*.

The Second Circuit thus mentioned the other *Pioneer* factors only to remove them from consideration, taking instead the "hard line" that a mistake of fact about the length of the appeal period is inexcusable. Pet. App. 21a. It did so precisely because it professed, for reasons of policy, a dislike of the kind of equitable balancing (and subsequent appellate review) that *Pioneer* commands: "the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced – where every missed deadline was the occasion for the embarkation *on extensive trial and appellate litigation to determine the equities of enforcing the bar*." *Id.* at 20a-21a (emphasis added). There could be no clearer statement of the conflict of the rule below with *Pioneer*.

Not only did the Second Circuit foreclose the equitable balancing *Pioneer* requires, but also it applied a rule that *Pioneer* expressly rejected when raised by the dissenting justices in that case: namely, that a movant must offer a "'sufficiently blameless'" reason for the delay in order for other factors to be weighed in the balance. See *Pioneer*, 507 U.S. at 395 nn.13-14; Pet. 10. Respondents have no answer to this point. Instead, respondents by *ipse dixit* convert the position of the *Pioneer* dissent into the holding of this Court, wrongly claiming in defense of the decision below that "*Pioneer* requires more than an excuse, it requires a *satisfactory* excuse." Hague Opp. 25.

Even though the decision below is flatly inconsistent with *Pioneer*, respondents nonetheless attempt to defend it as merely applying the principle recognized in *Pioneer* that neglect is "usually" not excused when it involves "inadvertence" to the rules, "ignorance of the rules, or mistakes construing the rules." 507 U.S. at 392. But there is no dispute that petitioners' trial counsel was keenly aware that Federal Rule of Appellate Procedure 4(a)(5) applied, had properly construed the Rule to require a notice of appeal to be filed no later than 30 days after entry of final judgment, and had attempted to comply with it. He simply made the mistake of relying on opposing counsel's calculation of the date, which proved to be erroneous. There was no inadvertence to, ignorance of, or mistake about the law – only a mistake of fact as to the deadline.

The Second Circuit has now extended this narrow observation disfavoring ignorance of the law into a broad exception that "failure to follow the clear dictates of a court rule will generally not constitute such excusable neglect." Pet. 21a (internal quotation marks omitted). But that exception swallows the excusable neglect rule of Rule 4(a)(5) and renders it a nullity. The 30-day appeal period from entry of judgment set forth in Rule 4(a)(5) is clear and unambiguous; thus *any* noncompliance (*i.e.*, any failure to file a notice of appeal within 30 days) is a failure to follow the clear dictates of the rule, and is now subject to the Second Circuit's unforgiving test in which equitable balancing of the reason for the delay against other factors is not allowed. The Second Circuit will forgive missed deadlines only in undefined "'exceptional circumstances'" if the error was within the movant's control. Pet. 23a; see *In re Town of Killington*, No. 2002-365, 2003 WL 22416506, ¶ 17 (Vt. Oct. 24, 2003) (characterizing *Silivanch* as a decision taking a "hard line when it comes to determining when neglect that stems from factors totally within the control of a party or its attorney is 'excusable'"). But this Court has emphatically held that the "'elastic concept'" of excusable neglect is not so

limited, *Pioneer*, 507 U.S. at 392, and "plainly contemplate[s] that the courts would be permitted, where appropriate, to accept late filings caused *by inadvertence, mistake, or carelessness*, as well as by intervening circumstances beyond the party's control," *id.* at 388 (emphasis added).[1] Here, counsel's failure to verify the appeal deadline was "neglect" as defined by this Court; the question of whether it is "excusable" necessarily entails the balancing of the reason for the neglect against the other factors that the Second Circuit has improperly removed from consideration. Indeed, respondents cannot come up with any circumstance that would not be subject to the Second Circuit's "hard line," or identify in what circumstances a missed appeal deadline would be subject to equitable balancing under the excusable neglect test. See Silivanch Opp. 14 n.7.

The short answer is that the Second Circuit's hard line against excusing any "failure to follow the clear dictates of" Rule 4(a)(5) is irreconcilable with *Pioneer* and the plain language of "excusable neglect." The Federal Rules could have made the 30-day appeal period a jurisdictional bright line, much like the 90-day rule for filing petitions for certiorari, Sup. Ct. R. 13.2. The policy reasons the Second Circuit sets forth (Pet. App. 20a-21a) could have been marshaled in support of such a rule. But the Federal Rules, perhaps in recognition of the harsh consequences of forfeiture of appeal rights and of the difference between direct appeals of right and discretionary review by a second appellate court, have adopted the "excusable neglect" standard when appeal deadlines are missed. The rule promotes the policy in favor of adjudicating appeals on the merits precisely because in most cases an error in meeting the deadline will not prejudice other parties or judicial proceedings. Furthermore, the Rule is structured to ensure that the relief is itself not prejudicial by requiring a motion within 30 days of the deadline, and by

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[1] Circumstances out of one's control (such as a vehicle breakdown enroute to court) do not generally involve neglect, and would be addressed under Rule 4(a)(5)'s "good cause" prong. Pet. App. 36a-37a.

limiting the extension to the later of 30 days from the deadline, or 10 days from the district court's order. Pet. App. 36a-37a. The policy choice embodied in Rule 4(a)(5) must be vindicated. The "excusable neglect" test of Rule 4(a)(5), by its plain terms, requires the district court to balance the equities by considering all circumstances. *Pioneer*, 507 U.S. at 388, 395. The Second Circuit has impermissibly forbidden it to do so.[2]

B. The petition demonstrates that the decision below not only is contrary to *Pioneer*, but it also has generated multiple conflicts with other courts of appeals as to (1) whether a court may elevate a single of the four *Pioneer* factors into a dispositive requirement; (2) whether, among courts of appeals that weight the *Pioneer* factors, the third *Pioneer* factor – the reason for the delay – or the first and second *Pioneer* factors – prejudice to other parties and the efficient administration of justice – are given primary importance; and (3) the type of conduct that is "excusable." See Pet. 11-17.

Unable to distinguish those conflicts, respondents the Silivanches (but not their co-respondents) attempt to evade them by implausibly asserting "*complete unanimity*" among the circuits. Silivanch Opp. 8. But all the cases that they cite as in harmony are classic mistake-of-law cases, where the movant had failed to heed or properly interpret the law. See *id.* at 16 n.8. Indeed, one of the cases expressly distinguishes between the rule it applies in mistake-of-law cases from that applicable to mistakes of fact. *Advanced Estimating Sys., Inc.* v. *Riney*, 130 F.3d 996, 999 (11th Cir. 1997) ("The ancient legal maxim continues to apply: ignorance of fact may excuse; ignorance of law does not excuse"). The Second Circuit has abrogated the distinction between mistake of fact and mistake of law, Pet. App. 22a-23a, but other circuits have

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[2] Contrary to respondents' contentions, Silivanch Opp. 7, 12, the decision below is not limited to the facts of this particular case. The Second Circuit created a general rule that the reason for delay (mistake of fact) has dispositive status under *Pioneer*; it applied that general rule here, but in no way limited future applications of that rule.

not. The tests they apply for noncompliance with a known rule are in stark conflict with the test the Second Circuit has applied here.

Respondents do nothing to refute petitioners' assertion of a division of authority where, as here, there has been no mistake of law but instead a simple mistake of fact. On this point, the circuits are decidedly split over whether such conduct is excusable. For example, in *Cheney* v. *Anchor Glass Container Corp.*, the Eleventh Circuit found excusable neglect where, though aware of the applicable rule governing filings, counsel failed to comply with that rule due to a miscommunication among lawyers. See 71 F.3d 848 (11th Cir. 1996). The Eleventh Circuit engaged in an equitable analysis of the four *Pioneer* factors and concluded that the excusable neglect standard was met. *Id.* at 850.

Petitioners' omission in this case is no different than the mistake-of-fact situation the Eleventh Circuit confronted in *Cheney*. Respondents unsuccessfully attempt to recast petitioners' neglect – like the omission at issue in *Cheney*, a mistake of fact – as a mistake of law. Hague Opp. 22-23; Silivanch Opp. 14 n.7. But such a characterization is belied by the record, which demonstrates that petitioners' counsel was not only cognizant of, but also intended to comply with, the governing rule. Respondents make no attempt to square the Eleventh Circuit's holding in *Cheney* – that a mistake of fact is excusable – with the *per se* rule created in the decision below that such a mistake is not excusable.[3]

Unlike the Silivanches, the other respondents acknowledge divergence among the circuits, but attempt to explain it away as an inevitable consequence of a balancing test, wherein "the various circuit courts in considering the four *Pioneer* factors have necessarily given different weight to these factors depending on the individual circumstances of the particular

[3] *See also In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 327 (3d Cir. 2001) (finding excusable neglect where movant failed to note newspaper advertisement that his right to a remedy was being litigated in a binding class action).

case under review." Hague Opp. 11. This argument does not withstand scrutiny. First, those respondents ignore that it is the district courts, not the courts of appeals, that engage in equitable balancing of the *Pioneer* factors. One would expect that the district court, in performing such balancing, may give different weight to different factors on the facts of the case. One would not expect, and this Court should not tolerate, divergence in the general rules that the courts of appeals announce to *constrain* the district court's discretion to find excusable neglect. Second, the conflicts identified concern those general rules announced by the court of appeals (which are not fact-specific), not the decisional outcomes that respondents devote much of their opposition to analyzing (which are fact-specific), see *id.* at 14-18. The conflicts are stark and warrant review by this Court.

C. Respondents the Silivanches make various arguments to suggest that this case does not present a good vehicle to resolve the conflicts described above. These arguments are so insubstantial and unfounded that neither the district court nor the Second Circuit paid them any mind, and tellingly their fellow respondents do not join those arguments.

1. The Silivanch opposition devotes much space to a discussion of cases establishing that if notice of a Rule 4(a)(5) motion is not given to other parties, the district court lacks jurisdiction to entertain such a motion. Silivanch Opp. 22-23 & n.12. As an initial matter, the Silivanches lack standing to raise this defense because it is undisputed that they were properly served. Their allegation is that *other* parties were not properly served. *Id.* at 22. Respondents cite no authority for the proposition – and there is none – that if other parties are not properly served, jurisdiction is defeated as to parties, like the Silivanches, who were timely served. Thus, the issue of proper service is irrelevant at least to the appeal of the judgment in favor of the Silivanches (who were awarded the lion's share of damages in this case), and thus no bar to this Court's review of the question presented. But, in any event, all parties received the requisite notice – which is evidently

why the other respondents who allegedly were not correctly notified never raise this argument.

First, service was proper as to all parties because it was made upon the Silivanches' counsel, who by order of the district court was liaison counsel responsible for giving notice to other parties. Pet. App. 30a-31a. The excusable neglect motion was made in the Silivanch docket, which was the bellwether docket (and in which the Silivanches were the only plaintiffs of record). Because of the prior district court order and the nature of the proceedings, service upon liaison counsel constituted service upon all the parties within the meaning of Rule 4(a)(5). Indeed, petitioners had served liaison counsel alone for years during the pendency of these proceedings without complaint from any party. There is nothing unusual in this practice; serving only liaison counsel is common in complex litigation where there are numerous parties and counsel. Second, even if service on liaison counsel were insufficient, any arguable defect in service to plaintiffs other than the Silivanches was cured because *all* parties had actual notice of petitioners' Rule 4(a)(5) motion, as the district court ruled. See Pet. App. 31a. The Silivanches now claim for the first time that the actual notice *other* parties received was too late, but that argument was not raised or litigated below.

Thus, it is beyond dispute that the district court had jurisdiction to extend the period for appealing the Silivanch judgment because the Silivanches' counsel was formally served. That alone eliminates any question of the suitability of this case for review by this Court. In any event, the Silivanches' arguments about the propriety of service on other parties is unavailing because service upon liaison counsel sufficed as to all other parties, and because those parties received actual notice of the motion. The red herring the Silivanches raise over the service of petitioners' Rule 4(a)(5) motion did not give the Second Circuit pause, and it likewise does nothing to diminish the worthiness of this case for review by this Court.

2. The Silivanches next assert that this case is a bad vehicle for review for a second reason (again without support of the other respondents). They allege that certain alternative arguments made in the district court hearing were not made in good faith, and thus one of the *Pioneer* factors – whether the party seeking an extension acted in good faith[4] – weighs against petitioners in this case. Silivanch Opp. 24-26.

This argument is both unfounded and irrelevant. First, the Silivanches neglect to disclose that the district court summarily dismissed their motion for sanctions, which was based on this very same bad-faith argument. See Pet. App. 31a-32a; Plaintiff's Memorandum of Law In Opposition To Essef's Motion Pursuant to Fed. R. App. R. 4(a)(5) and (6), at 17-18 (S.D.N.Y. filed Apr. 12, 2002). There was no finding that petitioners made any argument in bad faith, and respondents' overheated allegations were amply rebutted in the district court and ignored by the Second Circuit.

Second, these allegations are irrelevant to the good faith element of the *Pioneer* test. The sole inquiry for purposes of the *Pioneer* test is the existence of good faith in complying with the 30-day requirement for filing notices of appeal in Rule 4(a), not whether there was good faith in a subsequent

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[4] The Silivanches are correct that "good faith" is one of the four *Pioneer* factors and was mistakenly omitted in the petition's summary of those factors. But respondents' assertion that petitioners "conveniently, and misleadingly, omit any discussion of this important equitable factor," Silivanch Opp. 24 & n.13, is baseless. The central theme of the petition is that good-faith mistakes of fact should be subject to equitable balancing, and that the Second Circuit erred in excluding consideration of good faith. *See, e.g.*, Pet. 3 (noting that this Court in *Pioneer* held that "good faith and the absence of prejudice or of effect on judicial proceedings 'weigh strongly' in favor of finding excusable neglect" (citing *Pioneer*, 507 U.S. at 398)); *id.* at 6 (discussing the Second Circuit's recitation of the *Pioneer* factors as including, *inter alia*, "whether the movant acted in good faith" (internal quotation marks omitted)); *id.* at 8, 9, 15-16 (noting that the Second Circuit's treatment of good-faith mistakes was in conflict with other courts); *id.* at 10 (criticizing the decision below for not taking into account *Pioneer*'s good-faith inquiry).

excusable-neglect proceeding seeking an extension of time. See *Pioneer*, 507 U.S. at 395 (discussing good faith as a factor in what "sorts of neglect will be considered 'excusable'"). On the relevant point, even the Silivanches do not contest that petitioners' counsel made an honest mistake by erroneously relying upon opposing counsel's calculation of a deadline. Neither the district court nor the Second Circuit questioned the good faith of petitioners' counsel in complying with Rule 4(a)(5). The court of appeals instead acknowledged that the absence of good faith is "rarely" an "issue" in excusable neglect cases. See Pet. App. 17a (citing *Lowry* v. *McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir), *cert. denied*, 531 U.S. 929 (2000)). Indeed, the other respondents concede that the Second Circuit found good faith to be a factor favoring petitioners in this case. Hague Opp. 20-21. In sum, the Silivanches' arguments on good faith are both unsupported and beside the point, and cast no doubt on the suitability of this case for review.[5]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[5] The Silivanches assert that in order to reach the merits of the question presented in the Petition, this Court would have to decide first whether *Pioneer* applies to Rule 4 cases. *See* Silivanch Opp. 6 n.2. But they do not assert that there is any controversy on this point, nor do they even argue that it does not apply. First, *Pioneer* itself clearly established that the term "excusable neglect" – the same term employed by Rule 4 – is a term of plain meaning, *see Pioneer*, 507 U.S. at 388, and so excusable neglect has the same meaning in Rule 4 as it does elsewhere. Perhaps that is why every circuit to have addressed the issue has squarely held or accepted without question that *Pioneer*'s excusable neglect test applies to Rule 4, a fact of which this Court took notice of in *Stutson* v. *United States*, 516 U.S. 193, 194-95 (1996) (per curiam). Second, if there were any substantial doubt on the applicability of *Pioneer* to Rule 4, this Court would not have granted, vacated, and remanded in *Stutson* after the Solicitor General confessed error when a court of appeals failed to apply *Pioneer* in a Rule 4 case. The other respondents correctly concede that the issue is no longer in doubt after *Stutson*. *See* Hague Opp. 10 n.2.

Respectfully submitted,

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